Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

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IN THE MATTER OF JOSEPH F. GAZZA,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May government avoid liability under the Takings Clause for a taking of private property because the regulations prohibiting the use of the property were adopted before the property was acquired by the aggrieved owner?

2. Where the essential use of land is single-family residential, and government denies that essential use, thereby requiring that the land be left substantially in its natural state, may government avoid liability under the Takings Clause merely by ascribing value to the land as left substantially in its natural state?

NOTICE OF RELATED CASES

On the same day that the New York Court of Appeals decided this case, the Court also rendered opinions in *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 1997 WL 68232 (NY Feb. 18, 1997), *Basile v. Town of Southampton*, 1997 WL 68581 (NY Feb. 18, 1997), and *Kim v. City of New York*, 1997 WL 68593 (NY Feb. 18, 1997).

In all four cases, the New York Court held that fundamental attributes of ownership -- such as the rights to use property or to assert claims under the Takings Clause -- may be extinguished when the title to private property is transferred. The parties in these four cases are not related. Separate petitions for writs of certiorari are being filed in each case.

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No. _____

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IN THE MATTER OF JOSEPH F. GAZZA,

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-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Joseph F. Gazza, respectfully prays that a writ of certiorari issue to review the opinion and order of the Court of Appeals of the State of New York, entered in the above-entitled proceeding on February 18, 1997.

OPINIONS BELOW

The decision of the New York Court of Appeals is reported in *In the Matter of Joseph F. Gazza v. New York State Department of Environmental Conservation*, 1997

WL 68590 (NY Feb. 18, 1997), and is reprinted in the Appendix annexed hereto (la-24a).[1] The decision of the New York Supreme Court, Appellate Division, Second Department, is reported at 217 A.D.2d 202, 634 N.Y.S.2d 740 (2nd Dept. 1995), and is reprinted at 25a-44a. The decision of the New York Supreme Court, Suffolk County, is reported at 159 Misc.2d 591, 605 N.Y.S.2d 642 (Sup. Ct., Suffolk Co. 1993) and is reprinted at 45a-5la. The Decision of the Commissioner of the New York State Department of Environmental Conservation, the Respondent herein, is reprinted at 52a-78a.

BASIS FOR JURISDICTION

The final decision/order of the New York Court of Appeals was entered February 18, 1997. The New York Court considered and decided Mr. Gazza's claim that the refusal of the Respondent New York State Department of Environmental Conservation ("DEC") to grant variances from environmental regulations, which denied Mr. Gazza all economically viable use of his land, constituted a taking of property under the Fifth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment. This petition for writ of certiorari has been timely filed in accordance with Rule 13(1) of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257(a).

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[1]Numbers followed by the suffix "a" refer to Pages of the Appendix annexed to this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 25-0404 of the New York Tidal Wetlands Act, Article 25 of the New York Environmental Conservation Law ("ECL"), is reprinted at 85a.

STATEMENT OF THE CASE

On June 21, 1989, Mr. Gazza applied to Respondent, the New York State Department of Environmental Conservation ("DEC"), to construct a small home on an undeveloped lot in an existing single-family residential neighborhood (56a) in Quogue, New York. Mr. Gazza's lot is located partially in New York State-designated tidal wetlands and partially in land adjacent to wetlands. Construction of a home within an area adjacent to tidal wetlands is within the DEC's jurisdiction.

Approximately two and one-half years later, on January 16, 1992, the DEC denied Mr. Gazza's application (53a-54a).

Mr. Gazza's attempts to challenge the DEC's denial in the New York State Courts, as a regulatory "taking" in violation of the Takings Clause of the Fifth Amendment, have been unsuccessful.

The primary rationale advanced by the New York Courts in denying Mr. Gazza compensation under the Takings Clause[2] is that Mr. Gazza purchased his property after the enactment of the Tidal Wetlands Act. Pursuant to this Act and the DEC's tidal wetlands regulations,[3] Mr. Gazza needed variances from two setback restrictions in order to construct a home on his lot. The New York Court of Appeals held that Mr. Gazza had no property interest for which he could claim a taking or for which he was entitled to compensation because he acquired his lot after the enactment of the Tidal Wetlands Act (l4a). According to the Court of Appeals, when new owner(s) acquire regulated property, they do not acquire the entire property interests of their predecessors -- specifically, they do not acquire their predecessors' rights to be compensated for a regulatory taking of their property, even where the new owner(s) are the first to be denied the use of their land because of the regulations.

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[2]Under the applicable New York statute (ECL §25-0404 -- 85a), if the State Court were to determine that Mr. Gazza was entitled to compensation under the Takings Clause of the Fifth Amendment, the DEC would be able to elect to either (1) pay fair compensation or (2) grant Mr. Gazza a permit to use his property, thereby avoiding the obligation of compensation.

[3]Part 661 of Title 6 of New York State's Official Compilation of Codes, Rules and Regulations (NYCRR).

Under the New York Courts' rationale, constitutionally-protected property interests are not defined by rules or understandings[4] existing at the time those interests are created. Rather, the New York Courts would have the definition of property change over time, and be determined by all governmental legislative/regulatory enactments, whatever the source, that are in force at the time each owner acquires title.

The secondary rationale for the denial of Mr. Gazza's taking claim is that a mere recreational use of property -- i.e., a use which leaves property substantially in its natural state -- is sufficient to defeat a property owner's claim under the Takings Clause. In the trial court, the DEC offered testimony that ascribed value to Mr. Gazza's property, even assuming the property would be left substantially in its natural ("restricted") state with no right to build a habitable structure thereon (49a). The Court of Appeals held that this ascribed value, without the right to build a habitable structure, was sufficient to defeat Mr. Gazza's taking claim.

A. MR. GAZZA BUYS A SINGLE-FAMILY LOT IN AN ESTABLISHED RESIDENTIAL NEIGHBORHOOD, BUT THE DEC DENIES HIM THE RIGHT TO USE THE LOT FOR A SINGLE-FAMILY RESIDENCE

Mr. Gazza owns a single-family lot in the Village of Quogue, New York, that he has been seeking to use as the site for a home. Because the lot is located partially in and adjacent to tidal wetlands, Mr. Gazza needs a permit from

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[4]*See, Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 at 1030 (1992).

the DEC under the New York Tidal Wetlands Act (Article 25 of the New York Environmental Conservation Law) and the DEC's tidal wetlands regulations (Part 661 of Title 6 of New York State's Official Compilation of Codes, Rules and Regulations [NYCRR]).

Mr. Gazza is an attorney, builder, real estate investor, and developer (33, 34, and 64).[5] He purchased his lot in December 1989, for $100,000.00. His total investment in the lot was $131,019.09 as of April 15, 1993, the day his hearing started in the trial court (36 and 392-393).

Prior to purchasing the lot, Mr. Gazza carefully investigated whether or not the DEC would issue a permit allowing him to construct a single-family home. He had conversations with DEC representatives (52), who told him that it was possible to build a single-family residence on the lot, so long as it was a minimum-sized house with a minimum setback from the road (140-141). Mr. Gazza was also aware that the DEC had previously issued variances for the construction of single-family residences in similar circumstances (140).

Mr. Gazza's lot is 1.088 acres in area. Approximately 65% of the lot is tidal wetlands. The remainder -- i.e., the non-wetlands portion or "upland" -- is approximately 16,250 square feet in area. Mr. Gazza proposed to build a small house entirely on the upland portion of his lot (391).

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[5]Numbers in parentheses, without any suffix, refer to pages of the "Appellant's Appendix," which is part of the record in the New York State Court of Appeals. Petitioner cites to this record, without first transmitting it to this Court, in reliance on Rule 12(7) of this Court.

Mr. Gazza's lot is located in the Village's A-2 zoning district (400), in which single-family residences are the only permitted uses. Under zoning, Mr. Gazza's lot is large enough and has a sufficient "building envelope" for a house (295-296). In fact, the lot is located in an established single-family residential area, where similar properties are already improved with houses (see aerial photographs at 99a-l00a). A house could be constructed on Mr. Gazza's lot, in the upland portion, under local zoning and health regulations, but not under the DEC's setback requirements. Mr. Gazza, therefore, applied to the DEC for the necessary setback variances.

The DEC denied Mr. Gazza's application for variances in its entirety, but recommended, if Mr. Gazza wanted, ". . .a permit for a dock, catwalk and small parking area. . ." in lieu of a single-family home (54a). This alternative -- to make minimal improvements, keeping the lot substantially in its natural state -- is not permitted under local zoning (239). Had the DEC approved his application, Mr. Gazza could have constructed the house.

B. MR. GAZZA ASSERTS, IN COURT, HIS RIGHT TO A DETERMINATION THAT THE DEC'S DENIAL OF A PERMIT TO CONSTRUCT A SINGLE-FAMILY RESIDENCE CONSTITUTES A TAKING

After the DEC's denial of a permit, Mr. Gazza commenced a proceeding in New York State Supreme Court to establish that his property had been taken without compensation, in violation of the Takings Clause of the Fifth Amendment. This is the procedure established by the New York Legislature under the Tidal Wetlands Act (*see*,

ECL §25-0404, at 85a). Mr. Gazza's Petition to the New York State Supreme Court, dated February 7, 1992, appears at 79a-84a. In his Petition, Mr. Gazza asserted that his property had been taken by the DEC without compensation, in violation of the United States Constitution, and he requested a judgment from the Court that a taking had occurred (83a-84a).

C. THE TRIAL COURT AND THE INTERMEDIATE APPELLATE COURT HOLD THAT THERE WAS NO TAKING BECAUSE (1) MR. GAZZA HAD PRIOR KNOWLEDGE THAT HE WOULD NEED SETBACK VARIANCES FROM THE DEC, AND (2) THE LOT RETAINED SOME VALUE AS A "RECREATIONAL" – i.e., NON-HABITABLE – PARCEL

The trial court dismissed Mr. Gazza's case. The primary reason for the trial court's dismissal (48a-49a) was that Mr. Gazza failed to sustain his "heavy burden" of proof, which required him to prove every element of his claim beyond a reasonable doubt. As a secondary justification for dismissal, the trial court concluded that Mr. Gazza did not have "a compensable property interest" that could impose liability on government under the Takings Clause (49a-5la). This secondary justification was based upon two propositions:

1. that "the rationale behind" this Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), was ". . .to prevent a windfall to sophisticated purchasers," such as Mr. Gazza (50a); and

2. that Mr. Gazza, because of his prior knowledge of the wetlands regulations, did not have a sufficient "investment-backed expectation" to support a regulatory

taking claim under another opinion of this Court -- *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (50a).

The New York Appellate Division affirmed. It also pointed to the heavy burden of proof on a claimant, seeking to establish a regulatory taking, to prove all elements of his case beyond a reasonable doubt (36a). The Appellate Division opinion, however, relied more heavily than the trial court on Mr. Gazza's prior knowledge of the Tidal Wetlands Act and regulations to defeat his claim under the Takings Clause (25a).

Both the trial court and the Appellate Division also assumed that Mr. Gazza's lot retained economic value -- even after the DEC refused to permit the construction of a house thereon, thereby forcing Mr. Gazza to maintain his property substantially in its natural state. This assumption was based on the alleged useability of the lot for "restricted" (49a) or "recreational" (43a) purposes, in violation of Village zoning -- i.e., as a site for a small dock, a catwalk, and a parking spot.

D. THE NEW YORK COURT OF APPEALS HOLDS (1) MR. GAZZA'S PROPERTY INTERESTS DO NOT INCLUDE THE RIGHT TO MAKE ECONOMICALLY VIABLE USE OF HIS LAND, AND (2) MR. GAZZA MUST BE SATISFIED WITH HIS PROPERTY REMAINING ESSENTIALLY IN ITS NATURAL STATE

Mr. Gazza sought permission to appeal to the New York Court of Appeals. Permission was granted on July 2, 1996. In his appeal papers, Mr. Gazza contended, among other things: (1) that a property owner should not be denied a claim under the Takings Clause merely because he purchased his property after the adoption of the

regulatory restriction; (2) that the DEC's denial of a permit to build a habitable structure on his lot resulted in a categorical taking under the opinions of this Court, specifically under *Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. 1003 (1992); (3) that "imaginative" suggestions for the use of land -- which do not offer the property owner any beneficial or productive use but maintain the property substantially in its natural state -- should not defeat governmental liability under the Takings Clause; and (4) that the New York burden of proof imposed on the landowner in regulatory taking cases -- i.e., a "heavy burden" of proving every element of his case beyond a reasonable doubt -- is inconsistent with recent rulings of this Court. The Court of Appeals affirmed the Appellate Division and answered three of the contentions raised by Mr. Gazza; the Court declined to rule on the propriety of the New York burden of proof in regulatory taking cases (7a).

With regard to Mr. Gazza's first contention -- that purchase of property after the adoption of a regulation should not preclude a claim under the Takings Clause -- the Court established a new doctrine in this case and in its companion case, *Kim v. City of New York*, *supra*, to deny Mr. Gazza any redress under the Takings Clause. This new doctrine provides that a person acquiring real property after the adoption of a regulation -- even one recently adopted -- does not acquire the property right to use his land in contravention of the regulation. According to the Court below:

> ". . .a promulgated regulation forms part of the title to property as a pre-existing rule of State law. While the remaining property interests may still be freely transferred by the landowner, a purchaser's

title is necessarily limited to and by those property interests alone." (11a)

"Since the enactment of the wetland regulations, the only permissible uses for the subject property were dependent upon those regulations which were a legitimate exercise of police power. Petitioner cannot base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those state laws enacted and in effect at the time he took title and they are not dependent on the timing of state action pursuant to such law." (14a)

In *Lucas, supra*, 505 U.S. at 1027, this Court noted:

"Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

This Court explained in *Lucas* that restrictions for which no compensation would be required included "expressly prohibited purposes [which were] always unlawful." (*Id.*, at 1030)

Nonetheless, the New York Court applied a new, contrary doctrine, holding that, because the Tidal Wetlands Act and regulations were in existence when Mr. Gazza purchased his land, their potential to render his property useless was an aspect of his title "because he never owned an absolute right to build on his land without a variance" (l4a). This holding conflicts directly with the takings decisions of at least four other states, the Court of Appeals for the Federal Circuit, and this Court.

With regard to Mr. Gazza's second and third contentions -- that the denial of the right to build a habitable structure resulted in a categorical taking notwithstanding "imaginative" proposals for the use of the property -- the Court of Appeals held that there was no conflict with the Takings Clause because, among other things, "it [the property] could still be used for recreational purposes" and its economic value "had not been extinguished" (19a). This holding directly conflicts with the takings decisions of this Court.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Respondent DEC destroyed all economically viable use of Mr. Gazza's residentially-zoned lot when it denied him the right to build a single-family home on his land. The New York Court of Appeals held that Mr. Gazza has no interest in his land, for which he is entitled to bring a takings claim, because he bought the land after the adoption of the Tidal Wetlands Act and because all the value of the land was not extinguished, even though it could not be used for its intended and only beneficial purpose.

Under the Court's reasoning, Mr. Gazza's grantor could have sued for a taking if he had made the same application to the DEC and received a similar denial, although it is unclear whether the alleged residual value of the land, as left in a substantially natural state, would have nonetheless led the Court to deny a taking claim. The New York Court, however, emphatically held that Mr. Gazza,

immediately upon the transfer of the lot to him, lost any right to compensation under the Fifth Amendment for application of the Tidal Wetlands Act and its restrictive regulations to the property.

On the same day that the Court of Appeals denied Mr. Gazza his Fifth Amendment rights, New York's highest tribunal also decided three other cases on essentially identical grounds.[6] Already, lower courts and local tribunals in New York are applying the doctrine established in these cases to vitiate the protections of the Fifth Amendment's Takings Clause.[7]

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[6]*Basile v. Town of Southampton,* 1997 WL 68581 (NY Feb. 18, 1997); *Anello v. Zoning Board of Appeals, supra;* and *Kim v. City of New York, supra.*

[7]*See e.g., Brotherton v. Department of Environmental Conservation of the State of New York*, No. 12809-90 (unreported decision dated Feb. 24, 1997), where a Suffolk County Court held that an owner, who was precluded from making any economically viable use of his land, had no property interest to protect under the Takings Clause because the restrictive regulations were adopted prior to the property's transfer from a wholly-owned corporation to the firm's sole shareholder. The sole legal authority cited for this proposition was the opinion of the Court of Appeals in this case. The *Brotherton* decision, which has not been officially reported, is set forth in full at 86a-94a.

The *Southampton Press*, a newspaper published in Suffolk County, reported, in its April 24, 1997 edition, that the Town Board of the Town of Southampton refused to permit construction of a single-family home under local wetlands restrictions because the owner acquired it from her husband after the regulation had been adopted, even though her husband had acquired it before the regulation. The article reflects that the Town Board relied "on the Basile and Gazza decisions." (94a-98a)

The New York doctrine -- that a landowner has no protectable property interest where the application of a pre-existing land use regulation results in the elimination of all use of land -- directly conflicts with the decisions of this Court, as well as those of at least four states: Florida, Massachusetts, New Jersey, and Michigan.[8]

Furthermore, the New York Court's decision that a landowner's rights can be diminished or eliminated altogether with every transfer of title sharply conflicts with the opinion of the United States Court of Appeals for the Federal Circuit in *Preseault v. United States,* 100 F.3d 1525 (1996).

The New York Court's holding that a landowner cannot claim a right to compensation when the application of pre-existing land-use regulations preclude all use of his land directly conflicts with this Court's conclusion that the denial of all use of land is a categorical or *per se* taking. (*Lucas*, 505 U.S. at 1015). This Court has also concluded that a regulation requiring that land be left substantially in its natural state exemplifies a taking. (*Id.*, at 1018-19)

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[8] *Vatalaro v. Department of Environmental Regulation,* 601 So.2d 1223, 1229 (5th Dist. Fla. 1992), *review denied,* 613 So.2d 3 (Fla. 1992); *Lopes v. City of Peabody,* 32 Mass. App. Ct. 1124, 595 N.E. 2d 812 (1992), *review denied,* 413 Mass. 1105, 600 N.E.2d 171 (1992), *cert. granted and judgment vacated,* 113 S.Ct. 1574 (1993), *on remand,* 417 Mass. 299, 303, 629 N.E.2d 1312, 1314-15 (1994); *Moroney v. Mayor and Council of the Borough of Old Tappan,* 268 N.J. Super. 458, 465, 633 A.2d 1045, 1048 (1993), *cert. denied,* 136 N.J. 295, 642 A.2d 1004 (1994); *K & K Construction, Inc. v. Department of Natural Resources,* 217 Mich. App. 56, 64, 551 N.W.2d 413, 417 (1996).

Because the newly-enunciated doctrine of the New York Court of Appeals threatens to deprive individuals of constitutionally-guaranteed rights and directly conflicts with Takings Clause decisions of this Court, as well as the Court of Appeals for the Federal Circuit and the Courts of four other states, it is imperative that this Court grant certiorari to resolve the conflicts and uncertainty created by the New York doctrine.

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE THE SERIOUS CONFLICT BETWEEN THIS COURT AND THE NEW YORK COURT OF APPEALS

A. The New York Court's Conclusion That Mr. Gazza's Property Rights Did Not Include the Right to Use His Property Conflicts With This Court's Prior Determination That Property Rights Cannot Be Extinguished by a Mere Change in Ownership of Property

The New York Court held that Mr. Gazza never had the right to make use of his land because he acquired his lot after the adoption of the Tidal Wetlands Act (l4a). This holding ignores this Court's long-standing principles applicable to the Fifth Amendment's Takings Clause.

Property interests are defined by rules or understandings stemming from a source independent of the Constitution existing at the time the interests in property are created. (*Lucas,* 505 U.S. at 1030). These rules and understandings form the basis of relationships between

people and property. If these relationships are made subservient to changing regulatory schemes, there would be nothing to prevent the virtual elimination of protected private property interests. As Justice Holmes observed long ago:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation . . . .When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

This Court has stated more than once that a "state, by *ipse dixit,* may not transform private property into public property without compensation." *(Lucas,* 505 U.S. at 1031, citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 [1980]). More recently, this Court expressly held that ownership rights are not altered merely because property is acquired after a restrictive policy is implemented. *Nollan v. California Coastal Commission,* 483 U.S. 825, 833 n. 2 [1987]).

In *Nollan v. California Coastal Commission,* this Court observed that an owner's rights are not altered merely because land is acquired after regulations are enacted. (*Id.,* at 833 n. 2). The full "bundle" of ownership rights runs with the land. "Prior owners must be understood to have transferred their full property rights" when they convey property. (*Id.*, at 833 n.2).

In Mr. Gazza's case, and in the companion cases of *Anello*, *Basile*, and *Kim*, the New York Court dismissed this Court's holding in *Nollan.* Its dismissal of *Nollan* was expressly predicated on the *Lucas* opinion, which it apparently believes clarifies or partially overrules *Nollan.* In Note 3 of *Kim v. City of New York*, *supra*, the New York Court explained that this Court's use of the phrase "logically antecedent inquiry" in *Lucas* (505 U.S. at 1027) led it to conclude that governmental regulations inhere in an owner's title. The effect of this conclusion is that government, by mere enactment of regulations, acquires a property interest in land that diminishes the landowner's title. The New York Court, in *Kim*, stated that landowners, such as Mr. Gazza, take title to their properties subject to this governmental property interest. *Nollan* is distinguished by the *Kim* Court on the basis that the pre-existing limitation on land in that case was a "policy," not a legislative or regulatory enactment.

In other words, the New York Court of Appeals has espoused a rule that government automatically acquires a regulatory "easement" in private property whenever it enacts a statute or regulation affecting that property, and is exempt from the obligation of paying compensation for such regulatory "easements," at least to landowners who acquire their property after the government's easement has attached.

By its decision in this case, the New York Court has sent an unmistakable message to New York property owners. Those whose ownerships predate land-use restrictions can make beneficial use of their property or receive compensation for restrictions that deny them that

right. However, once property ownership is transferred, the right to make use of the land is no longer guaranteed, because the new owner does not acquire the right to compensation for the application of such restrictive measures. This right is stripped from the new landowner at the moment of transfer, the regulatory limitations are deemed to "inhere" in the landowner's title, and the former owner's rights are forfeited to the government.

B. The New York Court's Holding That Mr. Gazza Was Not Entitled to Compensation Because His Property Allegedly Retained Value "As Restricted" or Used for a "Recreational" Use Is an Attempt to Avoid This Court's Holding in *Lucas v. South Carolina Coastal Council*

In *Lucas v. South Carolina Coastal Council*, this Court described two distinct types of "categorical" takings. The first type is where "regulations . . . compel the property owner to suffer a physical 'invasion' of his property." (*Lucas*, 505 U.S. at 1015). The second type is where regulation "denies all economically *beneficial* or *productive* use of land." (*Id.*, at 1015 [emphasis added]).

This Court exemplified the second type of categorical taking as follows:

> ". . .regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, *by requiring land to be left substantially in its natural state* -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." (*Id.*, at 1018 [emphasis added]).

Mr. Gazza's property was zoned for single-family residential use and was located in an existing single-family neighborhood (see photographs of Mr. Gazza's and surrounding parcels reproduced at 99a-100a). The DEC's denial of Mr. Gazza's application for variances to permit construction of a residence on his property left Mr. Gazza's property vacant and "substantially in its natural state," as it appears in the photographs.

Nonetheless, as an "alternative analysis" (14a) for its rejection of Mr. Gazza's taking claim, the New York Court adopted the lower Court's conclusion that the economic value of Mr. Gazza's property had not been "extinguished" since the property "could still be used for recreational purposes. . ." (19a). The New York Court arrives at this conclusion even though it acknowledges that, in *Lucas*, this Court stated that takings have traditionally been found where a landowner is forced by government to leave his property substantially in its natural state (*Lucas*, 505 U.S. at 1018) (15a).

The "recreational purposes" for which Mr. Gazza's property could allegedly be used included only non-habitable and non-commercial uses.[9] These recreational uses included a dock, catwalk, and parking spot.[10]

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[9]The New York Court acknowledged that none of the "suggested" non-residential uses were permitted under the zoning applicable to Mr. Gazza's property without a variance (19a). The suggested non-residential "recreational" uses were, thus, illegal on their face.

[10]Similar "non-habitable improvements" were available to the Petitioner in *Lucas* as of right under the "Beachfront Management Act" (*see Lucas*, 505 U.S. at 1008-9, n. 2). The availability of such uses, although noted by this Court, did not diminish or defeat Lucas's categorical taking claim.

The New York Court's conclusion that the State's mere suggestion that there may be "recreational" uses for land is sufficient to defeat the landowner's taking claim is contrary to this Court's holding, in *Lucas*, that regulations which require a landowner to leave his land substantially in its natural state deprive the landowner of economically productive or beneficial use, thereby effecting a taking. (*Lucas*, 505 U.S. at 1018-19).

Under New York's analysis, this Court's *Lucas* formulation of ategorical regulatory takings is easily sidestepped. In New York, even where regulations deny the landowner the essential use of his land and require the land to be left substantially in its natural state, the State may defeat the landowner's taking claim merely by postulating recreational uses for the property and ascribing some "value" to those theoretical uses.[11] The New York Court does not even require the government to prove that the uses proposed are legally permissible -- even when the

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[11]It is interesting to note that, in *Brotherton v. Department of Environmental Conservation, supra* (86a-94a), the DEC convinced a New York Court to deny a taking claim, involving property in the same municipality as Mr. Gazza's property, by ascribing value to the property if left in its natural state -- as a "recreational" parcel. In fact, the DEC used the same appraiser for the *Brotherton* and *Gazza* trials and this appraiser ascribed the same "value" to the remaining "recreational" uses in both cases. The opinion states, in this regard, "There is ample evidence in the record that the property has recreational value" (92a). The recreational value in *Brotherton* was based solely on the ability to gain access to the water, not because the property could be used for any economically productive purpose (92a).

recreational uses are illegal on their face, New York requires the landowner to prove, "beyond a reasonable doubt" (*see*, *de St. Aubin v. Flacke*, 68 N.Y.2d 66 [1986]), that he could not make the proposed uses legal (by means of a successful "use variance" application). The New York approach erects insurmountable obstacles to the vindication of private property rights.

It is essential that this Court clarify that, when government regulation deprives property of its essential and only economically beneficial or productive use -- in this case, single-family residence -- and requires the land to be left substantially in its natural state, the possible existence of "recreational" uses for the property is not sufficient to defeat the landowner's taking claim.

II

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A DIRECT CONFLICT BETWEEN THE NEW YORK COURT OF APPEALS AND THE COURTS OF FOUR STATES AND THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT ON THE QUESTION OF LIABILITY FOR A TAKING OF PROPERTY UNDER THE FEDERAL CONSTITUTION

"Individual freedom finds tangible expression in property rights." (*United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 [1993]). However if property rights are to have any meaning, the power of the state to alter the definition of property must have certain constitutional limits.

The New York Court of Appeals ignored those limits when it held that the right of a property owner to make economically viable use of privately-owned land could be extinguished by a mere statutory enactment followed by a transfer of title of real property. Moreover, the New York Court's doctrine directly conflicts with the decisions of the courts of four states and the Court of Appeals for the Federal Circuit on this important constitutional question. Three of these decisions involve wetlands regulations, similar to the regulations imposed on Mr. Gazza's property.

A. The New York Doctrine Conflicts with the Florida Courts' Understanding That Fifth Amendment Protections Are Not Abrogated Merely Because a Property Owner Acquires Property After a Land Use Regulation Is Adopted

In *Vatalaro v. Department of Environmental Regulation*, a wetlands case, the Florida District Court of Appeal held that the denial of a permit constituted a regulatory taking of property even though the denial was based on a regulation that existed before the owner acquired her land. (*Vatalaro,* 601 So. 2d at 1229).

When Mrs. Vatalaro purchased two residentially-zoned lots, the Warren S. Henderson Wetlands Protection Act had been in existence for two years. (*Id.*, at 1225). Mrs. Vatalaro wished to build a home for herself and one for her daughter. However, because the lots were located within a 20-acre wetland, she needed a dredge and fill permit, which state authorities refused to issue. (*Id.*, at 1225-27).

Mrs. Vatalaro challenged the permit denial, which deprived her of all economically viable use of her property. The State countered that she purchased her property after the wetlands act was enacted, and therefore could not challenge its application. (*Id.*, at 1229).

The Florida Court strongly disagreed, holding that Mrs. Vatalaro had the right to build on her property and that the wetlands protection act, enacted before she purchased her land, did not insulate the state from takings liability arising from its denial of this right. (*Id.*). Mrs. Vatalaro's ownership rights were not less than those of her predecessor in interest -- as Mr. Gazza's were held to be.

B. The New York Doctrine Conflicts with the Massachusetts Supreme Judicial Court's Declaration That Pre-existing Land Use Regulations Do Not Divest Owners of Private Property Interests

In *Lopes v. City of Peabody,* another wetlands restrictions case, the Supreme Judicial Court of Massachusetts held that a property owner has every right to bring a taking claim based on the application of a pre-existing land use restriction.

In the mid-1970's, the City of Peabody enacted a zoning ordinance that established a wetlands conservancy district in various parts of the city. (*Lopes,* 417 Mass. at 300, 629 N.E.2d at 1313). In part, the ordinance established minimum elevation and setback requirements that had to be met before any construction could be approved. (*Id.*). Six years after the enactment of the ordinance, Americo Lopes acquired a lot, zoned for a single-family residence, which was located in a wetlands

district. (*Id.*, 417 Mass. at 300-01, 629 N.E. 2d at 1313.) Lopes could not build a residence on his lot under the wetlands restrictions imposed. (*Id.*, 417 Mass. at 301, 629 N.E. 2d at 1313-14).

The lower court denied Mr. Lopes any relief despite the fact that the ordinance denied him the ability to make any economically viable use of his property. (*Id.*). On appeal, the Massachusetts Appeals Court concluded that "Lopes, who knew of the regulations when he bought the parcel, 'can hardly claim inverse condemnation.'"(*Id.*, 417 Mass. at 302, 629 N.E. 2d at 1314).

After this Court granted Mr. Lopes's petition for writ of certiorari and remanded the case, the Massachusetts Supreme Judicial Court ruled that Mr. Lopes, whose property was "subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction." (*Id.*, 417 Mass. at 303, 629 N.E. 2d at 1314-15). The Massachusetts Court observed that:

> "A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability." (*Id.*)

The newly-created New York doctrine usurps essential ownership interests while promoting every one of the evils of which the Massachusetts Court warned.[12]

C. The New York Doctrine Is Inconsistent with the Conclusion of the New Jersey Courts That Property Rights Are Not Redefined Each Time Ownership Is Transferred

The Moroneys purchased a lot which, under a pre-existing zoning ordinance, was too small for a single-family house. (*Moroney,* 268 N.J. Super. at 462, 633 A.2d at 1047). The Moroneys applied for a hardship variance, which was denied. (*Id.*, at 461, 633 A.2d at 1046). However, a trial court found the denial constituted a taking of the Moroneys' property. (*Id.*, at 461, 633 A.2d at 1046-47). The Borough appealed, arguing that the Moroneys were precluded from claiming a taking because they knew the lot was undersized when they bought it. (*Id.*, at 462-64, 633 A.2d at 1047-48). The New Jersey appeals court disagreed, holding that property owners "stand in the shoes of their predecessors in title." (*Id.,* at 465, 633 A.2d at 1048). Therefore, the Moroneys had every right "possessed by the original owner." (*Id.,* at 464, 633 A.2d at 1048).

The New Jersey Court held that ownership rights are not redefined each time property is transferred.

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[12] *But see Leonard v. Town of Brimfield,* 423 Mass. 152, 155, 666 N.E.2d 1300, 1303 (1996) (limiting the extent to which a landowner can claim takings damages for a pre-existing regulation).

D. The New York Doctrine Conflicts with the Michigan Court's Conclusion That the Timing of a Regulation and the Transfer of Land Do Not Dictate When Just Compensation Will Be Required

J.F.K. Company owned land on which it wished to build. A permit to develop the property was denied, based on a determination that approximately 28 acres of that parcel were protected wetlands. J.F.K. sued, seeking a ruling that the denial of the permit constituted a taking of its property. (*K & K, supra*, 217 Mich. App. at 58). The Michigan Court of Claims determined that there had been a taking of J.F.K.'s property because the denial of the permit application rendered the property worthless. (*Id.*).

The State appealed, claiming that the permit denial was based on a fundamental principle of Michigan property law: the preservation of wetlands. (*Id.*, at 63). The Court of Appeal, citing *Lucas,* countered that the wetlands regulations were not part of the background principles of state law defining or limiting J.F.K.'s ownership interests in its land. (*Id.*, citing *Lucas*, 505 U.S. at 1030-31 [emphasis added]).

Furthermore, the Court observed that "[t]he decision to build a restaurant on land, or a request to fill in wetlands, do not constitute nuisances that the government may abate." (*K & K,* 217 Mich. App. at 63.).

The State also challenged J.F.K.'s right to object to the application of the wetlands regulation because the company had acquired title after the enactment of the regulation. Citing *Nollan's* Footnote 2, the Court of Appeal rejected this argument. (*Id.*, at 64).

Under the New York Court's doctrine, pre-existing land use regulations redefine the "bundle" of property interests acquired by each new owner. In Michigan, constitutionally-protected rights may not so easily be swept away.

E. The Court of Appeals for the Federal Circuit Has Expressly Rejected the Doctrine Now Adopted By the New York Court That Legislation Enacted After the Creation of Property Interests Can Redefine Ownership Interests without Requiring the Payment of Just Compensation

Under the New York Court's doctrine, a purchaser of real property has only those ownership rights which have not been previously legislated out of his "bundle." The Court of Appeals for the Federal Circuit recently rebuffed similar attempts to deny the constitutionally-protected rights of landowners, holding that the rights of owners of land are defined when the property interests are created and not by subsequent land use restrictions unrelated to nuisance, no matter what their source.

The Preseaults owned a tract of land on which they had a home. Railroad rights-of-way ran on three parcels within this tract. (*Preseault*, 100 F.3d at 1531). By their own terms, if the rights-of-way were no longer used for railroad purposes, the interests would revert to the owners of the underlying land. However, under the Federal "Rails-to-Trails Act," adopted in 1983, abandoned rights-of-way could be converted for use as public trails. (*Id.*, at 1524). The Preseaults challenged the conversion, under the Act, of the rights-of-way through their tract. (*Id.*, at 1536).

The United States argued that the Preseaults' property interests in the tract were not defined when the

railroad acquired its rights-of-way in 1899, but by the evolving enactment and implementation of law between 1899 and the dates the Preseaults acquired their land. (*Id.*, at 1537).

The Court of Appeals for the Federal Circuit categorically rejected the thesis that general legislation enacted after the creation of the property interests "somehow redefined state-created property rights and destroyed them without entitlement to compensation." (*Id.*, at 1530). Rather, the rights were defined by the original conveyances and remained unchanged notwithstanding subsequent regulatory enactments. (*Id.*, at 1537).

Criticizing the government's reliance upon a few inapt quotations from *Lucas,* the Court emphasized that the "background principles referred to by the Court in *Lucas* were state-defined *nuisance rules."* (*Id.*, at 1538 [emphasis added]).

> "Nothing in *Lucas* suggests that the background principles of a state's property law include the sweep of a century of federal regulatory legislation, and indeed much of what the Supreme Court said then, as well as in *Preseault II,* about property rights indicates to the contrary." (*Id.*, at 1539).

The Court concluded that the Preseaults could maintain their takings claim, despite their having acquired the property after the implementation of the regulations. (Id., at 1537).

The Federal Court of Appeals observed that the timing of land use regulations and ownership are simply irrelevant to the question of whether a property owner can

challenge the regulations as effecting a taking of property without payment of just compensation. (*Id.*, at 1540). According to the Court's understanding of *Lucas,* the relevant inquiry is about the background principles of property and nuisance law in existence at the time an interest in property is created, and not about subsequent regulations or legislation, whether state or federal.

> "Under the governing law of the State, the Preseaults, successors in title to those who owned the property, when the easements were created, owned the same title and interest as they, and are entitled to the same protections the law grants." (*Id.*)

The Federal Court of Appeals concluded that the timing of land use regulations and ownership are simply irrelevant to the question of whether a property owner can challenge the regulations as effecting a taking of property without payment of just compensation (*Id.*, at 1540):

> "Under the governing law of the State, the Preseaults, successors in title to those who owned the property when the easements were created, owned the same title and interest as they, and are entitled to the same protections the law grants."

The Federal Court also reaffirmed that, when government takes private property, the owner has an entitlement to compensation irrespective of any subjective expectations concerning the uses of land that will be permitted under existing regulations.

> "The expectations of the individual, however well-or ill-founded, do not define for the law what are that individual's compensable property rights." (*Id.*, 100 F.3d at 1540).

CONCLUSION

The New York Court's doctrine deprives individuals of fundamental constitutional rights. It conflicts radically with the takings decisions of four other states, the Federal Circuit Court of Appeals, and this Court. The doctrine reduces to a nullity this Court's rule that denial of all use of land is a categorical taking for which just compensation must be paid. Only this Court can resolve the conflicts created by the New York Court concerning important questions of federal constitutional law. For the reasons stated above, this petition for writ of certiorari should be GRANTED.

Dated: May 16, 1997

Respectfully Submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1996

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IN THE MATTER OF JOSEPH F. GAZZA,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

APPENDIX

SW

St. Louis West, Inc. (6252)

Appendix A - Opinion and Order of Affirmance of the Court of Appeals, State of New York, Filed February 18, 1997 [Pages 1a - 24a]

STATE OF NEW YORK

COURT OF APPEALS

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2 No. 10
In the Matter of Joseph F. Gazza,
Appellant,
v.
New York State Department of Environmental Conservation,
Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Stephen R. Angel, for appellant.
Gregory J. Nolan, for respondent.
Pacific Legal Foundation; Audubon Council of New York State, *et al.;* Environmental Defense Fund, *amici curiae.*

SMITH, J.:

The primary issue in this case is whether the denial of a building variance pursuant to environmental regulation effects an unconstitutional taking (US Const, Amend V; NYS Const, Art 1, § 7) for which the landowner must be justly compensated. Petitioner argues that the denial of a variance due to legislation enacted to preserve wetlands is a taking despite the fact that the legislation was fully

Appendix A
[Opinion and Order of Affirmance of the NYSCA]

enacted and in force when he purchased the property. We disagree and affirm the dismissal of the petition.

Petitioner purchased property located in a residentially-zoned district in the Village of Quogue, Town of Southampton, Suffolk County for $100,000. Approximately 65% of the 43,500-square foot parcel had previously been inventoried as tidal wetlands by the New York State Department of Environmental Conservation (DEC). As Supreme Court found, the purchase price reflected the fact that a variance would be required to build a residence on the property due to its incorporating tidal wetlands. Petitioner estimates that, assuming a variance were granted and a residence could be constructed on the property, the parcel would be worth $396,000.

Petitioner applied to the DEC for two setback variances from the requirements of 6 NYCRR 661.6 to enable him to construct a single-family home on the parcel. The first variance request was from the minimum 75-foot setback required between the tidal wetland boundary and the dwelling. The second variance request was from the 100-foot setback required between the wetland boundary and the planned septic system.

The matter was heard by an Administrative Law Judge (ALJ) who recommended that the application be denied. Nevertheless, the ALJ suggested the construction of a dock, catwalk, and/or a small parking lot as possible uses for the property. The Hearing Report of the ALJ was adopted as the decision in the matter by the DEC Commissioner.

Appendix A
[Opinion and Order of Affirmance of the NYSCA]

In concluding that the petitioner had not sustained his burden of showing that the variances would have no adverse impact on the tidal wetlands contained on the property, the DEC concluded:

> The proposed project and all of the many alternatives that were considered require a variance from the development restrictions of 6 NYCRR 661.6. To receive the variance, the Applicant has the burden to show that, among other things, the granting of a variance would not have an undue adverse impact on the present or potential value of the tidal wetland (6 NYCRR 661.12(a)). The record clearly demonstrates that the Applicant has not sustained this burden. The proposed project and any of the alternatives would eliminate or diminish several tidal wetland benefits, in particular, values related to flood control, wildlife habitat, marine food production and silt/organic material absorption. Exacerbating these impacts is the fact that losses would occur in one of the few functioning wetlands remaining in an otherwise developed area.

Moreover, the DEC made findings of fact that the proposed construction of a sanitary system threatened both marine life and humans, that other contaminants threatened the area and that flooding problems would be increased.

Appendix A
[Opinion and Order of Affirmance of the NYSCA]

Because the property was located in a residentially-zoned area, none of the uses suggested by the ALJ and adopted by the DEC were allowable without a variance from the Town's Zoning Board. Rather than apply for such a variance, petitioner filed this action pursuant to ECL § 25-0404 and article 78 of the civil practice law and rules.

In Supreme Court, petitioner did not contend that the DEC's determination was not supported by substantial evidence. Rather, petitioner argued that the decision of respondent, the DEC, constituted a taking without just compensation of petitioner's real property.[1] A hearing was held to determine petitioner's claim.

At the hearing, petitioner's appraiser testified that the value of the property without the wetlands restriction would be $396,000. Respondent's appraiser testified that under the wetlands restrictions, the property was still worth $80,000. There was also testimony from a local resident

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[1]The Fifth Amendment to the United States Constitution provides in relevant part that "no person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." The Takings Clause of the Fifth Amendment applies to State action through the Fourteenth Amendment (*Dolan v City of Tigard*, 512 US 374, ____, 114 SCt 2309, 2316 [citing *Chicago, B & Q. R.R. Co. v Chicago*, 166 US 226]). Article 1, Section 7 of the New York State Constitution provides in part that "[p]rivate property shall not be taken for public use without just compensation."

that in 1991 he offered petitioner $50,000 for the property, an offer that had not been withdrawn.

Supreme Court found that no taking had occurred and dismissed the proceeding. In so holding, the court found that petitioner had failed to demonstrate that his property had "but a bare residue of its value" due to the denial of a building permit and the application of the wetlands regulation. The court held:

> "The issue is whether petitioner offered sufficient proof to sustain his heavy burden of showing that the property, as restricted, has lost its economic value, or all but a bare residue of it. The answer is no. The whole focus of the testimony of his own real estate expert was that the property was not as valuable as it would be without the regulations. That is not enough, particularly when there was testimony from a real estate expert called by respondent to show the property, as restricted, had a value of approximately $80,000, which was not too much less than what petitioner 'paid' for it ($100,000)."

Supreme Court went on to explicate an alternative basis to deny petitioner relief. Citing *Lucas v South Carolina Coastal Council* (505 US 1003), Supreme Court concluded that because petitioner knew at the time he purchased the property that there were wetlands limitations, petitioner did not own an interest in the

property which could be "taken" by the denial of the setback variances. The Court noted that because his title was limited by the wetland regulations, petitioner had no reasonable investment-backed expectation that he could build a residence there.

The Appellate Division affirmed the dismissal of the petition and noted that "[c]entral to this appeal is the fact that at the time he purchased the property, the petitioner knew of the wetland regulations that 'burdened' it" (*Gazza*, 217 AD2d 202, 209). Petitioner argued that he was not bound by such knowledge since it was not until the variance was denied that he was made to suffer a regulatory taking. The Appellate Division disagreed and concluded:

> "that where, as here, a landowner does not have a reasonable investment-backed expectation that he would be able to build a residence on his parcel, he cannot claim a regulatory taking when his application for a permit to allow the construction of a building is denied" (217 AD2d 202, 203).

In other words, the Appellate Division, citing *Lucas v South Carolina Coastal Council, supra*, stated that at the time petitioner purchased this property, he did so knowing that wetland restrictions were in place. He thus knew that he was purchasing property with limitations on its use. It followed that he took title to the property with restrictions and no compensation was warranted.

Petitioner appeals the determination of his claim that his property has been taken without compensation. He also argues that this Court should review its decision in *de St. Aubin v Flacke* (68 NY2d 66, 76) which stated that a "landowner who claims that land regulation has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt." He claims that this burden is so onerous that it denies him the equal protection of the law.[2]

In 1973, the Legislature concluded that "tidal wetlands constitute one of the most vital and productive areas of our natural world, and that their protection and preservation are essential." The Legislature also noted its concern that much of the state's tidal wetlands had already been irreparably destroyed or despoiled and the remaining wetlands were in imminent danger of the same fate (L 1973, c 790, §1). Pursuant to these findings, the Legislature enacted the Tidal Wetlands Act and struck a balance between ecological and economic considerations by preserving and protecting tidal wetlands while permitting reasonable economic use and development (L. 1973, c 790; *cf. Spears v Berle*, 48 NY2d 254, 260 [discussing policy of Freshwater Wetlands Act enacted in 1975]).

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[2]We conclude that whether the petitioner must prove his claim beyond a reasonable doubt or by a lesser standard such as a preponderance of the evidence, there has been no taking and we decline to review the *de St. Aubin* decision.

Appendix A
[Opinion and Order of Affirmance of the NYSCA]

To implement this policy, the Legislature directed the Commissioner of Environmental Conservation to inventory all tidal wetlands in the State of New York (ECL § 25-0201). The Commissioner was also empowered to regulate the use of inventoried wetlands as well as the areas immediately adjacent thereto (ECL §§ 25-0202, 25-0301, 25-0302; *de St. Aubin v Flacke*, 68 NY2d 66, 70 [tidal wetlands are "subject to 'rigorous regulation'"] [quoting *Spears v Berle*, 48 NY2d at 260]).

The Legislature also enacted strict guidelines for the application and granting of permits to landowners desiring to conduct regulated activities in and around inventoried wetlands (ECL §§ 25-0402, 25-0403). The applicant has the "burden of demonstrating that the proposed activity will be in complete accord with the policy and provisions" of the Tidal Wetlands Act (ECL §25-0402[1]). Judicial review pursuant to article 78 of the civil practice law and rules is available to "[a]ny person aggrieved by the issuance, denial, suspension, or revocation of a permit" (ECL §25-0404). Here, the petitioner initiated an article 78 proceeding challenging the denial of his permit by the DEC.

As provided under section 25-0404:

> In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interest and objectives of

> this act, it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain (ECL § 25-0404).

Judicial review is a two-step process. As noted in *de St. Aubin*, "If the court finds that the permit denial is supported by substantial evidence, then a second determination is made in the same proceeding to determine whether the restriction constitutes an unconstitutional taking requiring compensation" (68 NY2d at 70; *see also Spears v Berle*, 48 NY2d at 261).

Turning to the first step in the process, the DEC's denial of the setback variances in *Gazza* is supported by substantial evidence. We have previously noted the findings and conclusions of the DEC. Moreover, petitioner does not dispute those findings or conclusions.

It must next be "determined whether the wetlands act, coupled with the denial of the ... permit, has placed such an onerous burden on the property that a taking must be deemed to have occurred" (*Spears v Berle*, 48 NY2d at 261).

In *Lucas*, the Supreme Court stated:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist

> compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property" (505 US at 1027).

Our courts have long recognized that a property interest must exist before it may be "taken" (*United States v Willow River Power Co.*, 324 US 499, 502-503; *Bennett v Long Island R Co.*, 181 NY 431, 435). Similarly, a taking claim may not be based upon property rights that have already been taken away from a landowner in favor of the public. For example, government may "assert a permanent easement that was a pre-existing limitation upon the landowner's title" (*Lucas*, 505 US at 1028-29). Similarly, regulatory limitations that "inhere in the title itself" will bind a purchaser (*id.* at 1029). To paraphrase Supreme Court's ruling, the purchase of a "bundle of rights" necessarily includes the acquisition of a bundle of limitations.

Under a State's power of eminent domain, the legitimate exercise of police power to advance the general welfare may result in the redefinition of property interests in favor of the public. It is that redefinition of a landowner's title that can serve as the basis of a takings

claim. Indeed, the United States and New York State Constitutions both provide that a private party must be compensated when such interests are "taken" away so a landowner may look to the government for just compensation upon the destruction of a formerly owned property interest.

However, once taken, those property interests are no longer owned by the private landowner and may not be sold by such party. Rather, a promulgated regulation forms part of the title to property as a pre-existing rule of State law. While the remaining property interests may still be freely transferred by the landowner, a purchaser's title is necessarily limited to and by those property interests alone.[3]

Of course, the state may exercise its police power of eminent domain only upon a showing of a valid legislative purpose. Thus, it has been recognized that a subsequent purchaser may attack previously enacted regulations that affect the purchased property as beyond government's legitimate police power (*see, e.g., Pennsylvania Coal Co. v Mahon*, 260 US 393, 413 ["it is always open to interested parties to contend that the legislature has gone beyond its constitutional power"]). In *Vernon Park Realty v City of Mount Vernon* (307 NY 493), this Court held:

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[3]The entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court. Petitioner does not base his claim on such grounds and we decline to reach the question.

> "Purchase of property with knowledge of the restriction does not bar the purchaser from testing the validity of the zoning ordinance since the zoning ordinance in the very nature of things has reference to land rather than to owner [citation omitted]. Knowledge of the owner cannot validate an otherwise invalid ordinance" (307 NY at 500-501 [citations omitted]).

While any party adversely affected by government action may attack such action as unconstitutional and illegitimate, petitioner does not claim that wetland regulation is beyond the State's power. Rather, petitioner simply claims that the property interest he had in building a dwelling on his land was taken by the State through the denial of the setback variance.

The determination of whether a property interest exists to support a taking claim is typically the threshold inquiry (*see Lucas v South Carolina Coastal Council*, 505 US 1003, 1027 [addressing the "logically antecedent inquiry into the nature of the owner's estate"]; *Kim v City of New York*, ____ NY2d ____ [decided today]).[4] In this case, the

[4]We note that although the issue must be addressed in every taking claim, the absence of an extended discussion does not indicate an erroneous omission. A court is not required to list every consideration upon which its decision is based. The existence of a protectible property interest may be clear (*see Lucas*, 505 US at 1017, n. 7).

petitioner's claim is based upon the denial of the setback variances. Petitioner had a reasonable expectation that the DEC would consider his request in accordance with the standards and purposes of the wetlands regulations generally and as applied to other landowners. The legislature has expressly provided for judicial review of DEC action taken pursuant to a permit request (ECL § 25-0404). Such action must state the "findings and reasons" upon which it is based (ECL § 25-0403). The Commissioner may elect the remedy if a court finds that a DEC determination "constitutes the equivalent of a taking without compensation" (ECL 25-0404).

We have previously noted that the subject regulations were implemented to balance ecological and economic considerations (ECL § 25-0102). The regulations of the DEC expressly provide that it must examine a permit request "taking into account the social and economic benefits which may be derived from the proposed activity" (6 NYCRR §661.9). In connection with its review of a permit request under its regulations, the DEC has the authority to "modify the application of any provisions in such a manner that the spirit and intent of the pertinent provisions shall be observed, that public safety and welfare are secured and substantial justice done" (6 NYCRR § 661.11).

Petitioner does not dispute that the DEC's determination is supported by substantial evidence. Thus, whatever claim petitioner may have had that his application was not decided in accordance with DEC regulations, must fail.

Appendix A
[Opinion and Order of Affirmance of the NYSCA]

Although petitioner's permit application was entitled to due consideration, petitioner's claim that the denial of his variance was a "taking" must fail because he never owned an absolute right to build on his land without a variance. As stated in *French Inv.* (39 NY2d at 597), "[i]t is recognized that the 'value' of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put." Since the enactment of the wetland regulations, the only permissible uses for the subject property were dependent upon those regulations which were a legitimate exercise of police power. Petitioner cannot base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those state laws enacted and in effect at the time he took title and they are not dependent on the timing of state action prusuant to such law.[5]

Although an analysis of the petitioner's title is dispositive, it should be noted that petitioner's taking claim would be infirm under the alternative analysis found by Supreme Court to which we now turn.

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[5]We have noted that state law may be examined "whatever its source" (*Kim v City of New York*, ____ NY2d ____ [decided today]). Thus, common law principles and state statutes may be examined to determine the limits and rights of a landowner's title.

Any takings analysis involves the resolution of whether the government legislation is "supported by a substantial State interest and close nexus" (*Manocherian v Lenox Hosp.*, 84 NY2d 385, 399-400; *see also French Inv.*, 39 NY2d at 596). There is no dispute that the protection of the New York State's tidal wetlands is a legitimate governmental purpose and restrictions regarding the amount of setback from the edge of the wetlands for building are reasonably related to that purpose.

Once it has been established that the regulations at issue are a legitimate exercise of police power, we must next determine whether the regulations result in a taking of petitioner's property by depriving the landowner of his property rights. Oftentimes, this question may be answered by examining the character of the government action (*Penn Central Transportation Co. v New York City*, 438 US 104, 124). For example, physical occupations have been ruled takings requiring compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it" (*Lucas*, 505 US at 1015; *see also Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419). A taking has also traditionally been found when the government requires land to be "left substantially in its natural state" (*Lucas*, 505 US at 1018). As stated in *Lucas*: "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking" (*Lucas*, 505 US at 1019 [emphasis in original]; *see also, Penn Central*, 438 US at 127-28 [discussing cases where a taking was found under regulations that rendered property "wholly

useless" or resulted in "complete destruction" of property interest]). Such circumstances have been characterized as a taking *per se*. The question becomes more complex when the government merely restricts certain uses for property.

The Supreme Court has noted that "government regulation -- by definition -- involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property" (*Andrus v Allard*, 444 US 51, 65). Courts have also recognized that regulatory power has constitutional limits (*see, e.g., Lucas*, 505 US at 1014 ["the government's power to regulate the range of interests included in the ownership of property [is] necessarily constrained by constitutional limits"]; *Pennsylvania Coal Co. v Mahon*, 260 US 393, 415 ["while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"]).

However, the outer limit of regulation needed to support a takings determination has not been amenable to firm demarcation (*see Spears*, 48 NY2d at 262 ["courts have encountered difficulty in formulating a bright-line standard for differentiating permissible police power measures from overly vigorous and hence unconstitutional impositions"]; *Lucas*, 505 US at 1015 ["we have generally eschewed any 'set formula' for determining how far is too far"] [citation omitted]). Accordingly, it has been necessary for courts to engage in "essentially ad hoc, factual inquiries" when presented with takings claims

(*Loretto*, 458 US at 426, *Lucas*, 505 US at 1015; *Penn Central*, 438 US 124).

Courts have enunciated several tests to resolve the fact-intensive question of the impact of regulation upon a landowner (*Andrus*, 444 US at 65 ["Formulas and factors have been developed in a variety of settings"]). Where a *per se* taking is not demonstrated, whether a taking has occurred may be determined by an examination of various factors such as those set forth in *Penn Central*: the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of the governmental action (*see, Lucas*, 505 US at 1019-1020, n 8). For example, an analysis of the regulation's economic impact upon the landowner is one way to resolve the issue. Such impact may be reflected by the economic viability (*Penn Central*, 438 US at 138, n.36) or the "reasonable return" on the property post-regulation (*id.* at 136). Under such an analysis however, it is clear that "the mere diminution in the value of property, however serious, is insufficient to demonstrate a taking" (*Concrete Pipe & Products of California v Construction Laborers Pension Trust*, 508 US 602, 645; *see also, Penn Central*, 438 US at 131 [cases "uniformly reject the proposition that diminution of property value, standing alone, can establish a 'taking'"]).

The Supreme Court in *Penn Central* (438 US 104) also noted that an examination of reasonable "investment-backed expectations" (*id.* at 124) may be particularly relevant. There is no such expectation that a government agency will act in a particular manner when it is not

authorized to do so (*See, e.g., Ruckelshaus v Monsanto Co.*, 467 US 986, 1006). Similarly, the mere fact that an agency may take such action does not necessarily give rise to a reasonable expectation when the agency chooses not to so act (*id.* at 1005 ["'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need'"] [citation omitted]). Expectations may also be examined in light of the level of interference with permissible uses of the land by the subject regulation (*Penn Central*, 438 US at 104).

While such tests may be used as an aid in determining the merits of a takings claim, it has been noted that "[r]esolution of each case ... ultimately calls as much for the exercise of judgment as for the application of logic" (*Andrus*, 444 US at 65). The primary inquiry must always focus upon "the question of the severity of the impact of the law on appellants' parcel" (*Penn Central*, 438 US at 136).

Furthermore, whatever the analysis used to determine the impact of regulation on a landowner, the fact that a regulation "deprives the property of its most beneficial use does not render it unconstitutional" (*Goldblatt v Hempstead*, 369 US 590, 592; *Penn Central*, 438 US at 130 [no taking shown merely because landowners are denied "the ability to exploit a property interest that they heretofore had believed was available for development"]). "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking"

(*Ruckelshaus v Monsanto Co.*, 467 US 996, 1005 [quoting *United States v General Motors Corp.*, 323 US at 378 [citation omitted]). Thus, a taking may be found only if an onerous burden forces property owners "alone to bear public burdens, which in all fairness and justice should be borne by the public as a whole" (*Armstrong v. US*, 364 US 40, 49).

Supreme Court found, and there is support in the record for the conclusion that the economic value of the property had not been extinguished since it could still be used for recreational purposes and that petitioner's reasonable expectations were reflected by his consideration of the inherent limitations on the property when he made the purchase offer for thousands less than its worth without the restrictions. Thus, his "reasonable" expectations were not affected when the property remained restricted. Petitioner argues that the finding of value does not take into account the fact that the non-residential uses proposed by DEC that add value to his land may not be undertaken without a variance from the Village.

In such circumstances, we have stated that petitioner has the burden of showing that it is unreasonable to expect relief from a zoning restriction (*de St. Aubin, supra*, 68 NY2d at 76, 78-79). Although petitioner did not have to complete the application process to meet his burden on the issue, his conclusory assertion that the zoning variance would not be granted is insufficient when the record contains "ample and convincing" evidence to the contrary (*Gazza*, 217 AD2d 202, 212). The Village Law provides that a variance may be granted if an applicant

cannot realize a reasonable return without it (NY Village L § 7-712-b[2][b]). The value of the subject property was, at most, diminished as restricted by the regulations.

Here, no *per se* taking occurred. Moreover, even if petitioner's "bundle of rights" included the "stick" he claims was taken, any burden resulting from the denial of the setback variances would not rise to the level of a taking (*Lucas*, 595 US at 1030). Rather, the alleged diminution of value and limitation of property uses caused by the environmental regulations would fall well within constitutional boundaries.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Gazza v New York State Dept. of Environmental Conservation No. 10

WESLEY, J.: (concurring)

I agree that petitioner has not established a taking because the economic value of his property has not been extinguished. For the reasons set forth in my dissenting opinion in *Anello v Zoning Board of Appeals* (____ NY2d ____ [decided today]), however, I cannot agree that petitioner would otherwise be unable to establish a taking because he acquired the property after the enactment of the Tidal Wetlands Act.

If, as the majority reaffirms, "a subsequent purchaser may attack previously enacted regulations that affect the purchased property as beyond government's legitimate police power" (Slip Op at l0-ll), then a subsequent purchaser should also be able to challenge an otherwise valid regulation if it results in a taking without compensation. There are many reasons why a prior owner might not have pursued a taking claim. For example, a prior owner may have lacked the financial resources to develop the property or to commence an action on a taking claim. Under the reasoning of the majority, the prior owner would nonetheless have had to keep abreast of regulatory enactments and, if an enactment appeared to deprive the property of its economic value, to challenge the statute. Otherwise, the property may have been rendered worthless without the government paying any compensation for the property. By conveying the property to another party who may be willing and able to develop it

or seek compensation for the taking of its value, the prior owner has instead, under the majority's holding, ensured the destruction of the property's economic value.

There is no need to create a rule of law that restricts the alienability of property in New York in this manner, when we all agree that petitioner has no taking claim for a different reason. Supreme Court determined, and the Appellate Division agreed, that petitioner had not met his burden of proving that the economic value of the property had been destroyed by the denial of a variance. I would affirm on that ground alone.

* *

Order affirmed, with costs. Opinion by Judge Smith. Chief Judge Kaye and Judges Bellacosa, Levine and Ciparick concur. Judge Wesley concurs in result in an opinion. Judge Titone took no part.

Decided February 18, 1997

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

2 No. 10
In the Matter of Joseph F. Gazza,
Appellant,

v.

New York State Department of
Environmental Conservation,
Respondent.

The appellant in the above entitled appeal appeared by Esseks Hefter & Angel, Esqs.;
the respondent appeared by Hon. Dennis C. Vacco, Attorney General of the State of New York; and *amici curiae* appeared by Bracken & Margolin, Esqs.; James S. Burling, Esq.; John A. Humbach, Esq.; Wilmer Cutler & Pickering, Esq. and James T. B. Tripp, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Smith. Chief Judge Kaye and Judges Bellacosa, Levine and Ciparick concur. Judge Wesley concurs in result in an opinion. Judge Titone took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Suffolk County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

_____

Stuart M. Cohen, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 18, 1997.

Appendix B - Order of Affirmance of the New York Supreme Court, Appellate Division Second Department, Filed December 4, 1995 [Pages 25a - 44a]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

In the Matter of Joseph F. Gazza,
Appellant, v New York State Department
of Environmental Conservation, Respondent.

OPINION OF THE COURT

FRIEDMANN, J.

On this appeal, we must determine whether a landowner who purchased property with the full knowledge that it had been designated protected tidal wetlands can claim that a regulatory taking occurred when he was denied a building permit for a residence. We conclude that where, as here, a landowner does not have a reasonable investment-backed expectation that he would be able to build a residence on his parcel, he cannot claim a regulatory taking when his application for a permit to allow the construction of a building is denied.

Appendix B
[Order of Affirmance of NYSC, AD2]

POINT I

This is a proceeding pursuant to ECL 25-0404 to review the denial of a permit to allow the construction of a building to the petitioner, Joseph F. Gazza, by the respondent, the New York State Department of Environmental Conservation. The petitioner purchased the subject parcel for $100,000 on November 29, 1989. Of the purchase price, $90,000 was used to discharge a tax lien that had been placed on the property by the Internal Revenue Service (I.R.S.). The parcel is located on the north side of Dune Road in the Village of Quogue, Suffolk County. The northerly side of the parcel fronts on the Quogue Canal.

At the time of the petitioner's purchase, approximately 65% of the in-excess-of-47,000-square-foot parcel had been inventoried as tidal wetlands by the respondent (*see,* ECL 25-0101 *et seq.*). These wetlands had first been inventoried in or about 1977. Some amendments to the designated wetlands on the parcel were made in 1981. The respondent's power to expand the inventoried wetlands on the subject parcel by the filing of an amended map was sustained by this Court (*see, Matter of Thompson v Department of Envtl. Conservation,* 132 AD2d 665, *affg* 130 Misc.2d 123).

Several months prior to the petitioner's purchase of the property, he submitted to the respondent an application to construct a single-family home on the parcel. As part of this application, the petitioner requested variances from the two setback requirements contained in the respondent's

regulations. The first variance request was from the minimum 75-foot setback required between the tidal wetland boundary and the dwelling (*see,* 6 NYCRR 661.6[a][1]). The second variance request was from the 100-foot setback required between the tidal wetland boundary and the septic system (*see,* 6 NYCRR 661.6[a][2]).

The matter was heard by an Administrative Law Judge (hereinafter ALJ) who recommended that the application be denied. In her report, the ALJ concluded that:

> "A preponderance of the evidence indicates that the proposed Project would cause undue adverse impacts on the wetlands' value for marine food production, wildlife habitat, flood, hurricane, and storm control, absorption of silts and other organic material, and cleansing of the ecosystem *** The proposed Project would eliminate one of the few remaining pristine and undeveloped wetlands in an otherwise developed area".

The ALJ therefore denied the application for a permit. However, the ALJ also recommended that at the petitioner's option, "since no party is in opposition, a permit for a dock, catwalk, and small parking lot may be issued".

The recommendation was adopted by the Commissioner of the Department of Environmental Conservation (hereinafter the DEC) on January 16, 1992. In

a subsequent letter, the DEC, by one of its attorneys, informed the petitioner that it would permit the construction of a parking area, single catwalk, and single dock of 20 feet on the property. The DEC would also permit either the placement of a mobile home "with self contained septic" on the site or the placement of a 100-square-foot shed for storage and mechanical systems that could be used for the mooring of a single- family houseboat.

POINT II

A

On or about February 10, 1992, the petitioner commenced the instant proceeding under ECL 25-0404, asserting that the respondent's denial of a building permit constituted a taking of his real property without compensation (*see,* ECL 25-0404).

At the hearing before the Supreme Court, the petitioner's appraiser, James R. McLauchlen, testified that assuming that a residence could be constructed thereon, the parcel was worth $396,000. McLauchlen used the direct sales comparison approach to derive this value. All of the 12 comparables that McLauchlen used were partially comprised of tidal wetlands. However, only two were comprised of from 65% to 70% tidal wetlands (i.e., as is the subject parcel).

No adjustment was made to any of the comparables to reflect the fact that a wetlands permit was required

before there could be construction on the subject parcel. In other words, McLauchlen assumed that the subject parcel could be sold in the marketplace unencumbered by any wetland restriction. In McLauchlen's words, his "assignment was based upon the assumption that there would be a minimum house or the ability to have a minimum house constructed on the property".

In contrast, the respondent's appraiser, Patrick A. Given, testified that at the time the petitioner purchased the parcel, it was worth approximately $80,000. One of the crucial assumptions made by the respondent's appraiser was that "a knowledgeable buyer would recognize that this property was not going to be readily buildable, that it would be speculative at best at that time". He therefore assumed that the highest and best use of the property would be for recreational use. It would be an attractive site for a houseboat or mobile home of some kind.

Mr. Given utilized the direct sales comparison approach, relying on four comparable sales which he believed were "similar to the subject [parcel] in that, number one *** they were [not] readily buildable for a single family residence and [number two], they had a highest and best use similar to the subject [parcel], that is: For a recreational use *** water access".

B

At the hearing before the Supreme Court, the petitioner attempted to establish that it would be impossible for him to construct a dock on the property because he would not be able to obtain the requisite permits from the local governmental entities. In this regard, Roy L. Haje, an "environmental consultant", testified.

Haje's firm obtains permits for people who wish to install docks or bulkheads, or do dredging or similar work. He testified that it would be unlikely that the Southampton Trustees would grant a building permit for the construction of a dock within the Quogue Canal abutting the petitioner's property. In a similar vein, Stanton J. Pohl, an attorney, concluded that it would be "highly unlikely" that the Zoning Board of Appeals of the Village of Quogue would grant a variance for the construction of a dock. In essence, to grant a variance for a dock on a parcel where there is no residence would be to permit a commercial activity in a residential zone. Pohl explained that the Zoning Board would be reluctant to do this.

Testifying for the respondent on this issue was Richard E. DePetris, an attorney who had represented the Zoning Board of Appeals of the Village of Quogue in connection with a variance application that the petitioner had made with respect to the construction of the proposed residence, which was subsequently withdrawn.

DePetris indicated that there was a strong possibility that the variances required for the off-street parking and the

catwalk would be granted. He also indicated that the variance necessary for the dock would also be granted. DePetris explained that the denial of the wetlands permit was a "significant factor to be considered" in this regard, because

> "One of the criteria to be considered under established case law and statutory law on a use variance is whether a reasonable return can be made from any permitted use. So if a property is eligible for erection of a one-family dwelling *** it would be very difficult for an applicant to be able to prove that he can't make a reasonable return from a permitted use *** therefore, it is only an unusual fact situation *** that the Board would ever seriously consider such an application.
>
> "Q. And in your opinion, the denial of the DEC Permit for the construction of a dwelling and sanitary system could constitute such an unusual circumstance, is that your opinion?
>
> "A. That is correct *** if the applicant cannot erect a one-family dwelling on his lot, that is a relevant factor in showing whether or not the applicant can made a reasonable return from the permitted use, one family dwelling".

C

The petitioner also testified at the hearing, stating that he paid $100,000 cash for the property. Of this, $90,000 was earmarked to discharge an I.R.S. tax lien of the prior owner.

The petitioner is an attorney who owns 50 rental properties, as well as commercial, industrial, and office buildings. He has extensive experience constructing houses in the Quogue/Southampton area.

The petitioner acknowledged that since 1990, each year he has successfully petitioned the Village of Quogue and the Town of Southampton for a reduction in the real estate taxes on the subject parcel. The basis for his applications is that his property "had wetlands on it and that should be taken into consideration in the taxing of this property".

He also acknowledged that, at the time of his purchase, he was aware that the bulk of the subject parcel had been inventoried as tidal wetlands. He was also aware that there had been prior litigation involving the subject parcel.

D

The Supreme Court denied the petition and dismissed the proceeding (*see, Matter of Gazza v New York State Dept. of Envtl. Conservation,* 159 Misc2d 591).

The court essentially relied on two grounds for its decision. First, the court concluded that the denial of the building permit could not be deemed a taking because the petitioner could still utilize the property for recreational purposes. Therefore, the court reasoned, its "economic value" had not been destroyed (supra, at 594).

Second, the court reasoned that the petitioner, at the time he purchased the property, could not have had a reasonable investment-backed expectation that he would be able to build a house thereon. In this regard, the court observed that the petitioner "'factored' in" the inherent limitations on the property when making his offer to purchase it (supra, at 595). As the court stated:

> "Gazza acquired a 'bundle of rights' when he purchased the Quogue property, but he also acquired a bundle of limitations. Those included the Tidal Wetlands Act.
>
> "Petitioner seeks to translate his '"unilateral expectation or *** abstract need"' into a '"reasonable investment-backed expectation".' (*Ruckelshaus v Monsanto Co.,* 467 US 986, 1005.) Since he was on notice of the pre-existing limitations on the property, and that those limitations advance a legitimate State interest, he cannot claim a taking (*supra,* at 1007)" (*Matter of Gazza v New York State Dept. of Envtl. Conservation,* 159 Misc2d 591, 595, *supra*).

POINT III
A

In this proceeding, the petitioner has not asserted that the denial of his building permit by the respondent was not supported by substantial evidence. Rather, the petitioner asserts that the denial of a building permit constituted a regulatory taking of his property for which he should be compensated.

The operative statute is ECL 25-0404, which provides as follows.

"Judicial Review.

"Any person aggrieved by the issuance, denial, suspension, or revocation of a permit may within thirty days from the date of the commissioner's order seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court for the county in which the tidal wetlands affected are located. In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interest and objectives of this act, it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been

taken, proceeding under the power of eminent domain."

In *de St. Aubin v. Flacke* (68 NY2d 66, 70, 76) the Court of Appeals made the following observations concerning the issue of a regulatory taking under ECL 25-0404:

> "Since wetlands restrictions are far more stringent than most other regulations -- restricting development per se -- the Legislature has provided property owners with a unique remedy against an unconstitutional taking within the context of the regulatory scheme itself. Thus, if a permit [for wetlands development] is denied or the permit offered is more limited in scope than that sought, the owner may seek judicial review of the administrative denial in a two-step proceeding. If the court finds that the permit denial is supported by substantial evidence, then a second determination is made in the same proceeding to determine whether the restriction constitutes an unconstitutional taking requiring compensation. The taking determination is made on the basis of a full evidentiary hearing and if the landowner prevails the Commissioner is directed, at his option, to either grant the requested permit or institute condemnation proceedings (ECL 25-0404 [citation omitted]) ***

> "A landowner who claims that land regulation has effected a taking of his property bears *the heavy burden* of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim *beyond a reasonable doubt* *** That burden remains upon him throughout the case and never shifts to the State. Only when the landowner establishes a prima facie case by presenting evidence of sufficient 'quality and weight' to permit the trier of fact to decide in his favor does the State have any burden at all and then it has only a practical burden of going forward with evidence in rebuttal or risk an adverse determination by the trier of fact rather than a legal obligation that is essential to avoiding judgment as a matter of law" (emphasis supplied).

In *Spears v Berle* (48 NY2d 254, 263), an earlier case involving the Freshwater Wetlands Act, the Court of Appeals made clear that "'dollars and cents'" specifics be shown to justify a claim of a regulatory taking. In this regard, the court stated as follows:

> "a land use regulation *** is deemed too onerous when it 'renders the property unsuitable for any reasonable income[,] productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value' *** Only when the evidence shows that the economic

value, or all but a bare residue of the value, of the parcel has been destroyed has a 'taking' been established" (*Spears v Berle, supra,* at 262-263).

B

Central to this appeal is the fact that at the time he purchased the property, the petitioner knew of the wetland regulations that "burdened" it. Nevertheless, the petitioner claims that he was not bound by this knowledge. Rather, he asserts that up until the building permit was denied by the respondent, there was always the possibility that he would be able to construct a residence on the parcel. Accordingly, he argues, it was not until that denial that he was made to suffer a regulatory taking which diminished the value of his property from $396,000 (its value as a buildable lot) to nothing.

We observe that the petitioner's claim that, during his tenure of ownership, his property was worth $396,000 is belied by the $100,000 purchase price he paid for the property. As the Court of Appeals has noted, a recent sale of a subject parcel is generally the "best evidence" of the parcel's value (*Matter of Allied Corp. v Town of Camillus,* 80 NY2d 351, 356). In the instant case, we have such a recent sale that reflects the "unbuildable" nature of the subject parcel. In other words, how can the petitioner reasonably claim that he expected to build a house on the subject lot, and that his reasonable expectations were

frustrated by the respondent, when his own purchase price reflects a diminished value for the parcel?

This interplay between a property owner's reasonable expectations and the impact of governmental regulation on property has been considered in cases of the United States Supreme Court. At this juncture, an examination of two of those cases is in order.

The first, *Lucas v. South Carolina Coastal Council* (505 US 1003) involved two beachfront lots in South Carolina, purchased in 1986. At the time of the purchase, there were no environmental restrictions on the property. In 1988, the State Legislature enacted the Beachfront Management Act which barred the petitioner from building any permanent habitable structure on his lots.

The petitioner in *Lucas* sought compensation for a regulatory taking. The Supreme Court (Scalia, J.) noted the well-established rule that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking" (*Lucas v South Carolina Coastal Council, supra,* at 1019 [emphasis in the original]). The court formulated the following rule:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate

> shows that *the proscribed use interests were not part of his title to begin with.* This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property" (*Lucas v South Carolina Coastal Council, supra,* at 1027 [emphasis supplied]).

In *Lucas,* the court remitted the case for a determination as to whether "common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land" (*Lucas v South Carolina Coastal Council, supra,* at 1031). However, as it pertains to the instant appeal, *Lucas* stands for the principle that the State must compensate a landowner for imposing certain comprehensive environmental restrictions provided "the proscribed use interests were not part of his title to begin with" (*Lucas v South Carolina Coastal Council, supra,* at 1027). This limitation is clarified in the concurring opinion by Justice Kennedy, which states as follows:

> "The finding of no value must be considered under the Takings Clause by reference to the owner's *reasonable, investment-backed expectations* *** Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable,

> investment-backed expectations" (*Lucas v South Carolina Coastal Council, supra,* at 1034 [Kennedy, J., concurring; emphasis supplied])

The concept of "reasonable investment-backed expectations" was extensively discussed in the earlier case of *Ruckelshaus v Monsanto Co.* (467 US 986, *supra*).

Ruckelshaus involved the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter FIFRA), which generally requires companies that desire to market a pesticide to submit the formula for the pesticide to the Environmental Protection Agency (hereinafter the EPA). The EPA then issues a registration for the pesticide. At issue was the fact that the formula that is submitted many times contains trade secrets that have been developed by the applicant at considerable time and expense. FIFRA, as amended in 1978, gave an applicant only 10 years of exclusive use of any "trade secrets" that are submitted in support of an application to register a pesticide.

In essence, then, FIFRA provides that, in order to market a pesticide (i.e., by obtaining a registration from the EPA), a company must, to some degree, give up its trade secrets to its competitors. The appellee in *Ruckelshaus,* the Monsanto Company, argued that this scheme constituted a "taking" of its property and, therefore, it was entitled to compensation under the Takings Clause of the United States Constitution.

The Supreme Court, in a 7 to 1 decision (O'Connor, J., dissenting in part), rejected this argument. In part, the court noted as follows:

> "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.' *** We find that with respect to any health, safety, and environmental data that Monsanto submitted to EPA after the effective date of the 1978 FIFRA amendments *** Monsanto could not have had a reasonable, investment backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration.
>
> "Thus, with respect to any data submitted to EPA on or after October 1, 1978, Monsanto knew that, for a period of 10 years from the date of submission, EPA would not consider those data in evaluating the application of another without Monsanto's permission ***. It was also aware, however, that once the 10-year period had expired, EPA could use the data without Monsanto's permission *** If, despite the *** data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable

investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission" (*Ruckelshaus v Monsanto Co., supra,* at 1005-1007, 1013).

POINT IV

Applying these principles to the instant case, we conclude that a reasonable purchaser in the petitioner's position would not have expected to have the unfettered use of the subject parcel. In other words, at the time the petitioner purchased the parcel, it would have been unreasonable for him to assume that he was purchasing its "full unrestricted residential value" (*Chase Manhattan Bank v State of New York,* 103 AD2d 211, 219). Therefore, the Supreme Court's conclusion that a "taking" did not occur upon the denial of a building permit by the respondent should not be disturbed.

The petitioner, however, argues that, as a result of the respondent's determination, he will be unable to use his property for *any* purpose, including recreational pursuits. Accordingly, he asserts, he has been deprived of all but a bare residue of the parcel's economic value (*see, Spears v Berle,* 48 NY2d 254, 262, *supra*).

This assertion is without merit. The respondent presented ample and convincing evidence that, in the words of one of its consultants, "an unusual fact situation"

existed that would lead the local authorities to grant the appropriate variances and permits so as to allow the construction of a dock and catwalk on the parcel. It was the petitioner's burden to prove that he would be unable to use his parcel for recreational purposes because the appropriate permits and variances would not be granted by the local authorities. Our review of the record sustains a finding that the petitioner did not meet this burden. We note that the petitioner apparently withdrew his variance application prior to a decision of the Village Zoning Board. The Court of Appeals has observed that "It may be that the best way for the landowner to meet this burden of proof is to establish that he sought a variance in good faith but was unsuccessful" (*de St. Aubin v Flacke,* 68 NY2d 66, 78-79, *supra).* Although there is no requirement that the landowner take this procedural route (*see, de St. Aubin v Flacke, supra),* the withdrawal of the variance application in the instant case is a probative fact militating against the petitioner's claimed inability to utilize his property for any purpose.

Thus, under the circumstances of this case, we cannot say that the Supreme Court erred when it determined that "the economic value of the land" had not been destroyed and that it rather retained significant value for recreational use (*de St. Aubin v Flacke,* 68 NY2d 66, 78, *supra;* ECL 25-0404; *cf.,* CPLR 7804[g]). We therefore conclude that the petitioner failed to meet his "heavy burden" of proving a taking "beyond a reasonable doubt" (*de St. Aubin v Flacke, supra,* at 76).

As noted, the petitioner's own purchase price of $100,000, when compared to its purported $396,000 appraised value as a buildable lot, reflects the parcel's diminished value. In other words, the very amount the petitioner paid for the property (which was remarkably close to the respondent's appraisal of $80,000) is strong proof of what his investment-backed expectations were at the time of the purchase. The petitioner, as a knowledgeable buyer, adjusted his purchase price to "offset" the restrictions that he knew had been placed on the property (*Berwick v State of New York,* 107 AD2d 79, 84). Under these circumstances, to give credence to the petitioner's claim of a taking, and to grant his application for compensation, would be to afford him a windfall that the law never intended taxpayers to shoulder. Accordingly, the Supreme Court properly dismissed the proceeding, and the judgment is affirmed (*see also, Manocherian v Lenox Hill Hosp.,* 84 NY2d 385, 392-393; *Matter of Ward v Bennett,* 214 AD2d 241; *Dawson v Higgins,* 197 AD2d 127).

BRACKEN, J.P., SULLIVAN, and KRAUSMAN, JJ., concur.

ORDERED that the judgment is affirmed, with costs.

ENTER:

Martin H. Brownstein
Clerk

Appendix C - Opinion of the New York Supreme Court, County of Suffolk (Mullen, J.S.C.), Filed October 18, 1993 [Pages 45a - 51a]

SUPREME COURT, SUFFOLK COUNTY
STATE OF NEW YORK

----------x

In the Matter of JOSEPH F. GAZZA, Petitioner, v
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Respondent.

----------x

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OPINION OF THE COURT

Michael F. Mullen, J.

This is a proceeding brought pursuant to CPLR Article 78, and ECL 25-0404, to review a determination by the Commissioner of Department of Environmental Conservation (DEC) dated January 16, 1992, which denied an application by petitioner Joseph F. Gazza for a tidal wetlands permit to build a single-family home located in the Village of Quogue, Town of Southampton, in Suffolk County.

Petitioner does not contend the determination was not supported by substantial evidence. He contends it amounts to a "taking" of his property without

compensation. In that regard, and pursuant to a prior order of this Court dated July 21, 1992, the matter was set down for a hearing, which has now been concluded. The hearing played out before this Court over several months, beginning in the end of March and finishing in the middle of June 1993.

As the hearing, petitioner's witnesses included himself and six others: an engineer, a surveyor, a marine operator, a dock builder, a real estate appraiser, and an attorney who specializes in zoning matters. For its part, respondent DEC called an engineer, a zoning attorney, a real estate appraiser, and an adjoining landowner.

The property in question is located on the north side of Dune Road, in the Village of Quogue. It is in an A-2 residential district, which requires a minimum lot of 43,500 square feet. The property is in excess of 47,000 square feet, and fronts on the Quogue Canal. Approximately 65% of the parcel has been inventoried as tidal wetlands.

The thrust of petitioner's energies has been to show that without the permit he cannot build on his property, i.e., he cannot economically use his property. And, if that is so, he argues, there has been a regulatory taking (citing *Lucas v. South Carolina Coastal Council*, 505 U. S. ____, 112 S Ct. 2886). He also argues that the suggested "uses" which the Commissioner would "permit", e.g., the construction of a parking area, single catwalk and single dock of 20 feet and shed for storage, etc., would never be approved by local officials.

Appendix C
[Opinion of the NYSC, Suffolk County]

As noted in *de St. Aubin v. Flacke* (68 NY2d 66, 76):

> "A landowner who claims that land regulation has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt."

To be successful, the landowner must establish that the regulation so restricts his property that he is precluded from using it for any purpose for which it is reasonably adapted. Stated another way, he must show by "dollars and cents" evidence that under no use permitted by the regulation would the property be capable of producing a reasonable return, i.e., that the economic value, or all but a bare residue of the economic value, has been destroyed (see, *de St. Aubin v. Flacke*, *supra*, at 79; *Spears v. Berle*, 48 NY2d 254, 263; *Matter of Kransteuber v. Scheyer*, 176 AD2d 724, 727, *affd* 80 NY2d 783; *Matter of Licari v. Scheyer*, 193 AD2d 604).

At bar, probably the most significant testimony at the hearing was supplied by the petitioner himself, Joseph Gazza. He is an attorney and experienced land developer. In the fal of 1989, he purchased the property for $100,000, and 90% of that amount went directly to the Internal Revenue Service to satisfy a lien.

The circumstances here show beyond cavil that the price the petitioner paid reflected that the property was

"burdened" by State and local regulations. As the Second Department recognized in a slightly different context in *Berwick v. State of New York* (107 AD2d 79, 84):

> "the law follows the realities of the marketplace, which are that a knowledgeable buyer would adjust his purchase price to offset the cost in time and money of applying for a permit and challenging its denial in court as confiscatory. Certainly, a knowledgeable buyer would not pay claimants the full unrestricted residential values of their properties on the day of taking, when the wetlands restrictions were still legally in effect. He would pay only the value of the property as so restricted, plus some increment representing its enhanced value at such future time when he is successful in nullifying the wetlands restrictions in court."

To further illustrate this point, there was evidence at the hearing to show that petitioner was successful on several occasions in having his real estate taxes on the property reduced. His argument to the assessor was essentially that the "property had wetlands on it and that should be taken into consideration in the taxing of (the) property".

In other words, it is clear that the property, as "restricted" by the Tidal Wetlands regulations, is not as "valuable" as it would be without them. But that is not the point. The issue is whether petitioner offered sufficient

proof to sustain his heavy burden of showing that the property, as restricted, has lost its economic value, or all but a bare residue of it. The answer is no. The whole focus of the testimony of his own real estate expert was that the property was not as valuable as it would be without the regulations. That is not enough, particularly when there was testimony from a real estate expert called by respondent to show the property, as restricted, had a value of approximately $80,000, which was not too much less than what petitioner "paid" for it ($100,000). In addition, there was a [sic] testimony from a local resident that he, through his attorney, offered petitioner $50,000 for the property in 1991, and that the offer had not been withdrawn.

But besides petitioner's failure to sustain his burden regarding the value issue, there appears to be another reason to deny him relief here. That involves the issue of whether petitioner had a compensable property interest in the first place. Although this issue appears to be one of first impression in New York, the reasoning of the United States Supreme Court in what both sides here agree is a landmark case, viz., *Lucas v. South Carolina Coastal Council (supra),* suggests the answer is no.

In *Lucas,* the Supreme Court indicated that an individual's interest in property can only be measured as of the time it is acquired (*supra*, 505 US at ____, 112 S Ct, at 2899). Or, to put it another way, "the relevant date for determining plaintiffs' historically rooted expectancies should not be that on which the parcels were conveyed by plaintiffs' predecessors in interest, but, rather, the dates on which plaintiffs themselves acquired title to their

properties." (see, *Preseault v. United States*, 27 Fed Cl. 69, 88.)

A question might be raised as to why the burden for seeking a declaration of a taking must be placed on the landowner at the time the regulation takes effect. The rationale behind *Lucas* (*supra*) is not to punish the "original" landowner, but to prevent a windfall to sophisticated subsequent purchasers. Here, at bar, the price petitioner paid for the property was significantly below market value. He "factored" in the inherent limitations on the property when making his offer. To hold now that there was a taking would result in rewarding speculation and placing an extraordinary burden on the State. Gazza acquired a "bundle of rights" when he purchased the Quogue property, but he also acquired a bundle of limitations. Those included the Tidal Wetlands Act.

Petitioner seeks to translate his "'unilateral expectation or *** abstract need'" into a "'reasonable investment-backed expectation'." (*Ruckelshaus v. Monsanto Co.*, 467 US 986, 1005.) Since he was on notice of the pre-existing limitations on the property, and that those limitations advance a legitimate State interest, he cannot claim a taking (*supra,* at 1007).

In sum, petitioner has failed to sustain his burden of proof. He is in the same position now as on the date he acquired the property. He cannot reasonably argue that his investment-backed expectations were impacted by legislation which had long been in place when he

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[Opinion of the NYSC, Suffolk County]

purchased the property (*Preseault v. United States, supra* at 95).

The proceeding is dismissed, and the request that the Court find that the Commissioner's determination constitutes the equivalent of a taking without compensation is denied.

Appendix D - Decision of the Commissioner of the State of New York, Department of Environmental Conservation, Dated January 16, 1992, With Hearing Report [Pages 52a - 78a]

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
50 Wolf Road
Albany, New York 12233-1550

In the Matter of the Application

- of -

JOSEPH F. GAZZA

for a Tidal Wetlands Permit and Variances to construct a single-family home and sanitary system on the Applicant's property located in the Village of Quogue, Town of Southampton Suffolk County, New York

Tidal Wetlands Application No. 10-89-1237

DECISION

January 16, 1992

Appendix D

[Decision of the Commission of the New York State Department of Environmental Conservation]

DECISION OF THE COMMISSIONER

The attached Hearing Report (the "Report") by Administrative Law Judge Judith K. Bentley, in the matter of the application submitted by Joseph F. Gazza, P.O. Box 969, 3 Ogden Lane, Quogue, New York for a Tidal Wetlands Permit pursuant to Environmental Conservation Law ("ECL"), Article 25, to construct a single-family home on Applicant's property located in the Village of Quogue, Town of Southampton, Suffolk County, New York (the "Project"), is hereby adopted as the Decision in this matter, subject to my comments below.

The proposed project and all of the many alternatives that were considered require a variance from the development restrictions of 6 NYCRR 661.6. To receive the variance, the Applicant has the burden to show that, among other things, the granting of a variance would not have an undue adverse impact on the present or potential value of the tidal wetland (6 NYCRR 661.12(a)). The record clearly demonstrates that the Applicant has not sustained this burden. The proposed project and any of the alternatives would eliminate or diminish several tidal wetland benefits, in particular, values related to flood control, wildlife habitat, marine food production and silt/organic material absorption. Exacerbating these impacts is the fact that losses would occur in one of the few functioning wetlands remaining in an otherwise developed area.

Accordingly, I conclude that the variances cannot be granted and the requested permit is denied. As

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[Decision of the Commissioner of the State of New York Department of Environmental Conservation]

indicated in the Hearing Report of ALJ Bentley, no party opposes the granting of a permit for a dock, catwalk and small parking area, as shown on the site plan for the Project. A permit for these structures may be issued.

IN WITNESS WHEREOF, the Department of Environmental Conservation has caused this Decision to be signed and issued and has filed the same with all maps, plans, reports, and other papers relating thereto in its office in the County of Albany, New York this 16 day of January, 1992

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
THOMAS C. JORLING, COMMISSIONER

s/_____

Appendix D
[Decision of the Commission of the New York State Department of Environmental Conservation]

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
50 Wolf Road
Albany, New York 12233-1550

In the Matter of the Application

- of -

JOSEPH F. GAZZA

for a Tidal Wetlands Permit and Variances to construct a single-family home and sanitary system on the Applicant's property located in the Village of Quogue, Town of Southampton, Suffolk County, New York

Tidal Wetlands Application No. 10-89-1237

HEARING REPORT

- by-

Judith K. Bentley
Administrative Law Judge

Appendix D
[Decision of the Commissioner of the State of New York Department of Environmental Conservation]

PROCEEDINGS

On June l, l990, the Region l Staff of the New York State Department of Environmental Conservation (the "Department Staff") deemed complete the application of Joseph F. Gazza, P.O. Box 969, 3 Ogden Lane, Quogue, New York ll959 (the "Applicant"), for a tidal wetlands permit to construct a single-family dwelling (the "Project") on a parcel of land (the "Site"), located north of Dune Road, and south of the Quogue Canal in the Village of Quogue, Town of Southampton, Suffolk County, New York.

The application was filed on June 2l, l989 and processed pursuant to Environmental Conservation Law ("ECL") Article 70 (Uniform Procedures); Article 3, Title 3 (General Functions); Article 25 (Tidal Wetlands); and pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Part 62l (Uniform Procedures) and Part 66l (Tidal Wetlands Land Use Regulations).

Pursuant to ECL Article 8, the State Environmental Quality Review Act ("SEQRA"), and the companion regulations in 6 NYCRR Part 6l7 (State Environmental Quality Review), the Department Staff determined that the Project is an unlisted action which would not have sufficient environmental impact to warrant the preparation of a Draft Environmental Impact Statement.

Notice of Complete Application, including notice of the Department's negative SEQRA determination, was

published in the Department's *Environmental Notice Bulletin* on June 20, 1990 and in the *Southampton Press* on June 21, 1990. Notice of the public hearing was published in the *Southampton Press* on August 30, 1990, and in the *Environmental Notice Bulletin* on August 29, 1990.

A public hearing on the application was convened pursuant to the provisions of Article 3 of the State Administrative Procedure Act and 6 NYCRR Part 624 (Permit Hearing Procedures) in the Quogue Village Hall, Jessup Avenue, Quogue, New York at 10:00 A.M. on October 3, 1990, before Administrative Law Judge ("ALJ") Judith K. Bentley.

The Applicant, an attorney, represented himself at the hearing.

The Department Staff was represented by John Byrne and Kathleen M. Shea, Esqs., Assistant Regional Attorneys, Region 1, Stony Brook, New York 11794.

Party status was accorded to the Group for the South Fork (the "Group"), 117 Main Street, Bridgehampton, New York 11932. The Group was represented by Carolyn Zenk. Party status was also accorded to Robert and Joan Larson and Alan and Barbara Peters (the "Larson/Peters"), represented by Stephen Latham, of the law firm of Twomey, Latham, Shea and Kelly, 33 West Second Street, Riverhead, New York 11901.

An Issues Conference was held immediately following the public legislative hearing on October 3, 1990,

attended by the Applicant, the Department Staff, the Larson/Peters and the Group for the South Fork. The Department Staff raised various issues, which resulted in an Issues Ruling, dated January 30, 1991. The Ruling determined that the Applicant was not entitled to use an averaged setback, as provided for under 6 NYCRR 661.6(a)(1), which would have allowed the proposed residence to be located approximately 57 feet (by Staff's calculation) or 33 feet (by Applicant's calculation) from the edge of the subject wetlands, rather than the 75 feet setback normally required by the wetlands regulations. Accordingly, the variance requested was *increased* by 18 feet or 42 feet, depending on which of the averaged setback figures is used. The Issues Ruling was appealed to the Commissioner, who upheld my determination in an Interim Decision dated May 3, 1991. The adjudicatory hearing was held on May 15 and 16, 1991.

On May 28, 1991, Applicant submitted to Staff documents purporting to be a "revised and clarified survey-site plan." The report also addresses the merits of this plan, in that it would still require significant setback variances for the dwelling and septic system.

Pre-filed Testimony

In response to the request of the Applicant at the close of the May 16, 1991 hearing date, and in the interests of administrative efficiency, it was ruled that the direct cases of the Group and Larson/Peters would be in the form of sworn written testimony, which is now received into the record. The Group submitted a final statement

simultaneously with its prefiled testimony on July 31, 1991. The Applicant's post-hearing memorandum was received on September 23, 1991. The pre-filed testimony of Larson/Peters was received on August 2, 1991. Their closing memorandum was received on September 30, 1991. The Department Staff's closing brief was received October 1, 1991, at which time the record was initially closed. The objections of Applicant as to the qualifications of the Larson/Peters witness Glenn Just are overruled. Glenn Just urges consideration of the cumulative impacts of such a project on the wetlands system of the general area, and on the shellfishing industry, and outlines observations of flooding and wildlife at the site. His experience has been as an environmental consultant, primarily in projects involving freshwater and tidal wetlands. He was previously employed as an environmental analyst and by the New York State Department of Environmental Conservation as a Marine Resource Technician, and as a Fish and Wildlife Technician. While he does not appear to possess a degree in a specialized area, he is sufficiently qualified by his work experience to offer the subject testimony.

The Applicant was given an opportunity to cross-examine the witnesses who submitted written testimony, and by letter of August 5, 1991, the Applicant stated he waived such opportunity. He also stated that he did not wish to present any rebuttal case.

Appendix D
[Decision of the Commissioner of the State of New York Department of Environmental Conservation]

Site Visits

The ALJ made site inspections on October 3, 1990 and May 17, 1991, touring the entire site, the Quogue Canal and Dune Road.

Motions to Reopen the Record

On October 30, 1991 an unusually destructive North Atlantic storm struck the Atlantic Coast, causing loss of life, devastating flooding, extensive beach erosion and property damage in the millions of dollars. The south shore of Long Island was reported to be severely impacted, in particular Dune Road, in Westhampton Beach, two or three miles from the Site. Upon motion of Larson/Peters and with consent of the Applicant, photographs taken during the height of the storm were submitted by the Larson/Peters. The Applicant submitted photographs of the Site after the flooding had subsided. These photographs with the affidavits which sponsor them, are received into evidence. The submittals of the Larson/Peters dated November 1 and 6, 1991 are deemed marked "L/P 2" in evidence, and that of the Applicant "V" in evidence.

On November 23, 1991 the Applicant submitted for my consideration a revised project plan which provided for a sanitary system elevated to above the level of the highest tide elevation from the above-referenced storm of October 30, 1991. By letter dated November 27, 1991 the record was reopened to consider this revision. The system is set back 58 feet from the edge of the wetlands. This plan is deemed

marked as Applicant's Exhibit A-3 and received into evidence. The other parties did not comment on this revision, having been given until December 17, 1991 to do so.

SUMMARY POSITIONS OF THE PARTIES

The Applicant

The Applicant contended that a variance and tidal wetlands permit should be granted since the proposed Project would not have any undue adverse environmental impacts. The Applicant also contended that denial of the variance would foreclose any reasonable use of his property. In addition to his testimony, he presented two witnesses in support of his case. He also contends that the project proposed requires the smallest possible variance, and provides the maximum mitigation of impacts.

The Department Staff

The Department Staff opposed the granting of a variance and a tidal wetlands permit to the Applicant, contending that the proposed Project would cause undue adverse impacts to the benefits provided by the tidal wetland and adjacent area. More specifically, the Staff indicated that the Applicant failed to present information which demonstrated that the proposed Project was compatible with the preservation, protection and enhancement of the benefits provided by this tidal wetland. To support its position, the Department Staff called as its witness Charles T. Hamilton, Regional Manager with the

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[Decision of the Commissioner of the State of New York Department of Environmental Conservation]

Department's Marine Resources Division, Bureau of Marine Habitat Protection, Stony Brook Regional Office.

The Intervenors Group for the South Fork and Larson/Peters

The Group for the South Fork and the Larson/Peters who were accorded party status, agreed with the position of the Department Staff stated above, and generally opposed the Project. The Group and the Larson/Peter's presented their direct case by sworn written testimony.

REGULATORY STANDARDS

"661.l0 STANDARDS FOR ISSUANCE OF PERMITS

Burden of Proof. The applicant shall have the burden of establishing that the applicable standards of this section will be met.

"(b) ...

"(c) Standards for permits on adjacent areas. The Department shall issue a permit for a proposed regulated activity on an adjacent area only if it is determined that the proposed regulated activity:

"(l) is compatible with the public health and welfare;

"(2) complies with the development restrictions contained in section 661.6 of this Part;

"(3) will not have an undue adverse impact on the present or potential value of any adjacent or nearby tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research or open space and aesthetic appreciation, taking into account the social and economic benefits which may be derived from the proposed activity;

"(4) complies with the use guidelines contained in Section 661.5 of this part ..."

Since the proposed Project does not comply with the Development Restrictions outline in 661.6(a)(l) regarding the minimum setback requirements, the Applicant requests a variance due to the impossibility of compliance. "The minimum setback of any onsite sewage disposal septic tank, cesspool, leachfield or seepage pit shall be l00 feet landward from the most landward edge of any tidal wetland." [6 NYCRR 661.6(a)(2)] "The minimum setback of all principal buildings...shall be 75 feet landward from the most landward edge of any tidal wetland." [6 NYCRR 661.6(a)(l)] "(F)or any onsite sewage disposal cesspool, septic tank, leachfield or seepage pit there shall be a minimum of two feet of soil between the bottom of such pool, tank, field or pit and the seasonal high groundwater level,..." [6 NYCRR

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661.6(a)(3)]. The Department may issue a variance for developmental restrictions in accordance with 661.13:

"Variances. (a) Where there are practical difficulties in the way of carrying out of any of the provisions of section 661.6 of this Part or where in the Department's judgment the strict application of the provisions of section 661.6 of this Part would be contrary to the purposes of this Part, the Department shall have authority in connection with its review of an application for a permit under this Part to vary or modify the application of any of such provisions in such a manner that the spirit and intent of the pertinent provisions shall be observed, that public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research or open space and aesthetic appreciation. *Any person wishing to make application for such a variance shall do so in writing in conjunction with his application for a permit* under the Part and shall specify the proposed variance, the facts which support the granting of the variance and the minimum variance necessary to alleviate the alleged difficulty. *The burden of showing that a variance to such provisions should be granted shall rest entirely on the applicant.*" [emphasis supplied.]

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FINDINGS OF FACT

1. By application filed in May of 1989, Applicant seeks approval to place 180 cubic yards or more of fill and construct a single-family dwelling with a footprint measuring 36' x 18', deck, parking area, sanitary system, catwalk, dock and two mooring piles in the adjacent area of a wetland on an approximately 1.088 acre parcel of land located north of Dune Road and south of Quogue Canal at 121 Dune Road in the Village of Quogue, Town of Southampton, Suffolk County, New York. The parcel borders Quogue Canal near the opening to Shinnecock Bay. (The general location of this property is shown on Appendix A at the arrow marked "Site")

2. A variance is required from a minimum building setback of 75' from the tidal wetlands boundary as mandated by 6 NYCRR 661.6(a)(1) and from the 100' minimum setback from the boundary for sewage disposal systems mandated by 6 NYCRR 661.6(a)(2). The proposed deck is 12' x 8' (96 square feet), the proposed walkway is 4' by 265' extending into the High Marsh Area, and the proposed dock is 8' x 5', located in the shoals and mudflats area. The proposed deck is separated from the house by 1/4 inch, but for purposes of calculating setbacks is considered to be part of the dwelling. The proposed house is as close as 28' from the wetlands, and the deck as close as 23'. Because of the requirements of F.E.M.A. (Federal Emergency Management Agency) the house must be located at elevation 11 feet.

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[Decision of the Commissioner of the State of New York Department of Environmental Conservation]

3. The site ranges in elevation from approximately 1 foot above mean sea level ("MSL") adjacent to the Canal, to 6 feet above MSL at the highest point. There is a drainage swale along the western boundary of the site. Groundwater was found at 1.5 feet above MSL. The groundwater level fluctuates by 1.5 to 2 feet i.e. up to elevation 3.5 feet.

4. The Applicant has requested a variance from certain sections of 6 NYCRR Part 661. Applicant has revised the project several times during the processing of this application, and during the course of this hearing. The two plans considered at the hearing were denominated Exhibits A-1 and A-2. The proposed dwelling is shown at a 30 foot setback from the road in Exhibit A-1, and at a 40 foot setback in Exhibit A-2. In order to build at 30 feet from the road, the Applicant would have to obtain a variance from the local zoning which requires a 40 foot setback from the front lot line to the structure.

5. The project site consists of 47,393 square feet of which approximately 27,100 square feet is tidal wetlands consisting of intertidal and high marsh areas. These areas are "pristine" meaning they are clean, undisturbed and in excellent condition. The adjacent area consists of 20,250 square feet by Applicant's calculations, or approximately 15,000 square feet, according to calculations of the Staff's expert witness.

6. In the plans which were the subject of the hearing testimony, the sanitary system expansion pools are located 64' from the wetlands at its closest point. The later

submitted plan A-3 shows the system to be approximately 58 feet from the wetlands edge. The record does not indicate the precise elevation of seasonal high groundwater level, but it is estimated to be at elevation 3.5 feet. The Applicant does not dispute that a two foot separation must be maintained between the system and the seasonal high groundwater level. Applicant therefore proposed to modify the plans which were the subject of this hearing to such extent as to locate the sanitary system at elevation 5.5 or 6.5 feet. The most recently submitted plan for the system places it above the level of the highest tide experienced as a result of the storm of October 30, 1991, which inundated the Site. The systems proposed consists of a septic tank, five cesspool rings and two expansion rings. Fill (approximately 180 cubic yards, or 500 cubic yards by the calculations of Staff) will raise the area of the elevation of the proposed septic tank. The greater the separation between the base of the system and the seasonal high groundwater, the greater the amount of fill will be necessary. A retaining wall for this fill will be 55' from the closest wetlands. The retaining wall to hold the fill will be located in the drainage swale on the western side of the site. The top of the wall as shown on the plans is at elevation 7 feet. If Applicant increases the elevation of the system, the wall will be higher. The plans received at hearing show the grade of the fill above the septic tank to be at elevation 9.5 feet, and above the expansion pools at elevation 7.5 feet. These figures would increase if the elevation of the system is increased as proposed.

7. In the Decision dated May 31, 1985, then Commissioner Williams amended Tidal Wetland Map No.

702-520 to add approximately 0.2 acres to this Site as high marsh tidal wetlands. It was determined that this area should be added to the tidal wetland maps because it provided benefits of high marsh (HM) areas. The Site meets the definition and description ascribed to tidal wetlands found in ECL Article 25 and 6 NYCRR Part 661.

8. The amendment to Tidal Wetlands Map No. 702-520, initiated in 1985, was finalized in 1989. During the instant proceeding, the tidal wetlands boundary as it actually exists on the site was delineated, flagged and revised upon the project plan by mutual consent of the Applicant and the Department, which for the purposes of this proceeding is binding. An official amendment of the Tidal Wetlands Map No. 702-520 was not completed, but Staff indicated that the entire Shinnecock-Moriches Bay area was to be the subject of remapping in the near future.

9. As of the date of this hearing, the tidal wetlands classifications present at the Site are adjacent area, shoals and mud flats, intertidal marsh (approximately 80 feet wide) and high marsh (approximately 100 to 120 feet wide). The benefits of the shoal and mudflat areas at this site include marine food production, cleansing of ecosystems, absorption of flood and storm waters, recreational uses, wildlife habitat, open space and aesthetic appreciation. The specific intertidal marsh values at the site include marine food production, wildlife habitat, cleansing of ecosystems, absorption of sedimentation, open space and aesthetic appreciation. The high marsh values present at this Site include flood and hurricane control, marine food production, wildlife habitat, cleansing of ecosystems,

absorption of sedimentation, open space and aesthetic appreciation. The values of the adjacent area at this site include absorption of flood and storm waters, cleansing of ecosystems, absorption of sedimentation and wildlife habitat.

10. Various wildlife species observed to be present on the Site include snowy egrets, least terns, plovers, killifish, melampus snails, herons, warblers, redwing blackbirds, geese, ducks, quail, squirrels, rabbits, voles, moles, muskrats, diamond back terrapin, owls, harriers and peregrine falcons among others.

11. More specifically, regarding marine food production, the products of photosynthetic production enter the bay and contribute to the base of the food chain. The Site provides habitat for forage fish which are fed upon by larger fish and by avian species.

12. The adjacent area of the Site reduces flooding of Dune Road and near-by developed properties by providing a collection site for storm water runoff. Because of its vegetative nature and the location of the Site, suspended silts and organic materials settle out as the tidal waters and storm waters collect on the Site. Water quality is, therefore, improved. This was graphically illustrated by the photographs of the Site taken after the October 30, 1991 storm. They show little or not evidence of erosion on the Site after the flood waters receded.

13. The placement of fill (6 NYCRR 661.5(b)(30)) and the construction of a single-family home and septic

system (6 NYCRR 661.5(b)(45) and (46)) in an adjacent area are each generally compatible uses requiring a permit. The open pile catwalk four feet or less is classified under 6 NYCRR 661.5(b)(14) as generally compatible permit required. The construction of a dock in a shoal/mudflat are classified under 6 NYCRR 661.5(b)(15) as generally compatible, permit required.

14. There is the potential that active viruses may travel from the septic system into the adjacent Shinnecock Bay waters, be ingested by shellfish, which if eaten raw by humans, may cause sickness. It is estimated that spring, storm or moon tides will bring water to within 10 feet of the expansion pool location, and to within 17 feet from the proposed northwest pool of the 5-pool leaching system. Viruses may travel up to 200 feet from a leaching system in viable condition. The photographs of the Site taken during the October 30, 1991 storm show that the waters of the Quogue Canal inundated the entire Site, including the area of the proposed sanitary system.

15. The waters of Shinnecock Bay in the vicinity of the site are classified as "SA" for shellfishing purposes. ("SA" is the highest classification accorded to tidal waters and indicates that the Bay is intended for primary and secondary contact recreation and for harvesting of shellfish for market purposes.) The Bay near the Site was at the time of the hearing closed to shellfishing due to contamination of the waters (i.e. a high coliform bacteria count was found, indicating an excessive input of animal excretion and/or septic system leachate). The viruses which reach the Quogue Canal and the Bay may also cause

illness in swimmers. Other contaminants such as fuel oil, gasoline, turpentine etc. may also be introduced into these waters through the septic system.

16. It is anticipated that the proposed sanitary system will discharge approximately 65% of nitrogen loading and increase nitrogen contamination to the underlying groundwater, which connects to marine waters. Nitrogen concentrations of 5.9 mg/l or 37.8 pounds of nitrogen per acre per year are estimated in accordance with the Long Island Regional Planning Board "208" study. Other sources of nitrogen, such as household fertilizer used on lawns and shrubs, may be anticipated. The maximum allowable concentration discharging to groundwater is l0 mg/l. By Applicant's calculation, there is nitrate amounting to 39 mg/l in leachate and nitrate of 60 mg/l of septic tank effluent. There is no indication in the record that the nitrogen released will contravene any regulatory standard. The release of nitrogen from the sanitary system and other sources into the marine waters may result in algae blooms, compromising the waters for shellfishing, finfishing and swimming. The proposed system could be failing to remove the predicted amount of nitrogen, and unless the system backed up into the house, the homeowner would be unaware of such failure.

17. The substantial retaining wall necessitated by the addition of fill into the area of the proposed sanitary system, in order to create a separation of two feet (or four feet as later proposed) to seasonal high groundwater level, will contribute to flooding by interfering with the drainage swale located in the southwest corner of the Site, creating a

hazard to the public, and will increase soil erosion and contamination of and sedimentation into the wetland.

18. Dune Road has a major flooding problem, at times causing the road to be nearly impassable. A drainage system was recently installed along the road in an attempt to correct this problem. Substantial flooding occurs at the Site on a periodic basis in conjunction with storm tides, moon tides and spring tides, estimated to occur 5 to 6 times per month. The potential for flooding at the Site was dramatically illustrated on October 30, 1991 when an Atlantic (non-hurricane) storm at its height, inundated the entire adjacent area of the Site, including the location of the residence. The staked location of the residence was covered with approximately 18" of water. The photographs submitted show Dune Road to be submerged, receiving flood waters through the drainage ditch on the western side of the Site. One photograph shows the Quogue Canal breaching Dune Road on the eastern property line.

19. Construction material will be stored at some location on the Site other than within the footprint of the house, sanitary system and appurtenances. Large pieces of heavy construction machinery will be brought onto the Site. The applicant proposes to place hay bales and fences on the Site to protect the wetlands as much as possible during the construction process.

20. By Applicant's calculation approximately 2,270 square feet of land, or 5% of the total site, will be regraded and altered by removal of soil and trees. Approximately 3,746 square feet (or 8%) of the original vegetation will be

destroyed. The most heavily vegetated portion of the Site is in the southwest corner. The vegetation in this area will either be totally obliterated or heavily impacted by the sanitary system and house. The area under the house will be rendered unsuitable as a wildlife habitat. there is no effective way to screen the house by new vegetative plantings, since it will be a structure of two stories raised on pilings to an elevation of 27 1/2 feet. There will be temporary and permanent impacts on fauna, through habitat destruction and the effects of human activity. The project will permanently impact on approximately 18% of the adjacent area, by Applicant's calculation or 33% by Staff's expert's calculation. Approximately 50% of the adjacent area will be temporarily impacted by construction.

21. It is estimated that 1,846 square feet (or as much as 1,996 square feet with the addition of 150 square feet of exterior stairs and landing as proposed in Exhibit A-2) of impervious surfaces in the form of roofs, walkways, decks, will be created, which may increase storm run-off problems. The proposed mitigative measures of gutters and drywells are not likely to be effective because the groundwater table is too close to the surface. The values of the adjacent area for control and absorption of flood and storm water, sedimentation control and cleansing of ecosystems will be compromised or eliminated. This will result in a negative impact on the high marsh area.

22. The Site may at some future time contain a lawn, although the currently proposed vegetation is beach grass and black pines which will not require fertilization. The ability of a lawn to control rainwater is less than a

naturally vegetated upland buffer. A lawn may result in the entrance of pesticides, herbicides and fertilizers into the surface waters. There is no effective way to enforce a prohibition against the application of these substances which have negative impacts on wetland values.

23. The recommended width for the buffer area in such a project is 40-50 feet between the wetland and project. A distance of only 23-33 feet is maintained here. The wildlife usage of the high marsh and intertidal marsh areas will be negatively impacted, in that in the zone close to the dwelling wildlife will not enter to nest, in the surrounding zone they will not enter to rest, and beyond that the impact will be on the usage by wildlife as a feeding area.

24. The proposed catwalk and dock are generally compatible uses under Part 661. There will be a one inch space between the wooden planks of the catwalk decking, in order to minimize interference with the functions of the wetland. The catwalk is located as close to the western property boundary as zoning allows, thereby protecting open space and aesthetic appreciation of the wetland. No party opposes a catwalk or dock.

25. The Applicant purchased the property in November of 1989, with knowledge of the pertinent development restrictions.

26. While the area of Dune Road in which the project is located may be occupied predominantly on a seasonal basis, there is no known prohibition to the year-

Appendix D
[Decision of the Commission of the New York State Department of Environmental Conservation]

round use of residences in this area. The house will be heated by an electric heat pump. Applicant now intends to utilize the property for seasonal rental after it is improved.

Appendix D
[Decision of the Commissioner of the State of New York Department of Environmental Conservation]

CONCLUSIONS

1. The Applicant has failed to meet his burden of demonstrating that the Project (and any of the variations submitted to date) is compatible with the spirit and intent of the pertinent provisions of the Act, as required by the provisions of 6 NYCRR 661.13(a). Applicant has neither shown that the proposed Project would preserve and protect tidal wetlands nor that it would prevent their despoliation and destruction.

2. The evidence shows that impacts on public health, safety and welfare may occur as a result of the Project. Even given the most recent proposal to elevate the sanitary system to a level above the highest tide of the October 30, 1991 storm, there remains the fact that when the waters of the Quogue Canal inundate the Site on a regular basis, there will be little or no horizontal separation between the sanitary system and the surface waters of the Canal. While the added fill beneath the system will provide for the minimum two foot vertical separation between the bottom of the system and the seasonal high groundwater level, the fact remains that the regulations specify a 100 foot separation between the system and the wetlands boundary. There is a public health risk potentially created when, during flooding on the Site, the leachate from the system could discharge directly into surface water. The evidence shows that the 100 foot setback is necessary for the treatment and removal of harmful bacteria and viruses.

Appendix D
[Decision of the Commission of the New York State Department of Environmental Conservation]

3. The record in this case shows that the current proposal is not compatible with the preservation, protection or enhancement of the present and potential uses of this tidal wetland. A preponderance of the evidence indicates that the proposed Project would cause undue adverse impacts on the wetlands' value for marine food production, wildlife habitat, flood, hurricane, and storm control, absorption of silts and other organic material, and cleansing of the ecosystem. There was no showing of any enhancement of the tidal wetlands benefits enumerated under 6 NYCRR Part 66l. The Applicant has failed to meet his burden of showing that a variance should be granted.

4. There is evidence the Project would cause undue adverse impacts on the values of the adjacent area, including absorption of flood and storm waters, cleansing of ecosystems, absorption of sedimentation and wildlife habitat.

5. No evidence was presented regarding any significant social and economic benefits that would accrue from the proposed Project. It may be concluded that the Applicant will benefit financially from the construction and rental of the proposed house.

6. The proposed Project would eliminate one of the few remaining pristine and undeveloped wetland in an otherwise developed area.

7. There is no justification to grant a lesser variance than the one requested.

Appendix D
[Decision of the Commissioner of the State of New York Department of Environmental Conservation]

RECOMMENDATION

After a review of the entire record and based on the foregoing Findings and Conclusions, it is recommended that the subject application by Joseph F. Gazza for a tidal wetlands permit and variance be denied. At the Applicant's option, since no party is in opposition, a permit for a dock, catwalk and small parking lot as shown on the plans may be issued.

Appendix E - Petition of Joseph F. Gazza to New York Supreme Court, Suffolk County, Index No. 92-2985, Dated February 7, 1992 [Pages 79a - 84a]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

In the Matter of the Application of

JOSEPH F. GAZZA,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules relating to a Decision dated January 16, 1992 of the New York State Department of Environmental Conservation

PETITION

Index No. 92-2985

- against -

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent

----------X

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of Joseph F. Gazza respectfully alleges:

Appendix E
[Petition of Joseph F. Gazza, NYSC, County of Suffolk]

1. At all times relevant, petitioner Joseph F. Gazza was and is a resident of the County of Suffolk and State of New York.

2. At all times relevant, petitioner Joseph F. Gazza was and is the owner of certain real property having an area of more than one (1) acre located on the north side of Dune Road, Village of Quogue, Town of Southampton, Suffolk County, New York (the "property"). The property is shown on the Suffolk County Tax Map as 0902-015.000-01.00-013.000.

3. Respondent, New York State Department of Environmental Conservation ("DEC") has jurisdiction pursuant to Article 25 of the Environmental Conservation Law ("ECL") to issue tidal wetlands permits.

4. On or about June 1, 1990, the DEC accepted, as complete, an application made by petitioner Joseph F. Gazza for a permit under Article 25 of the ECL and other applicable laws and regulations of the DEC for a tidal wetlands permit for the property.

5. A public hearing on the application was held before an Administrative Law Judge of the DEC.

6. At the hearing, petitioner caused to be offered the following evidence, among other things:

a) That in the event a permit for the construction of a dwelling and accessory structures on the property was

not issued by the DEC, petitioner's otherwise valuable property would be rendered valueless.

b) That a dwelling could be constructed on petitioner's property in such a way as to minimize any effect on tidal wetlands.

c) That the proposal for the location and size of a single-family residence was designed so as to have a minimum impact on tidal wetlands and still provide for some economical use of the property.

d) That petitioner would suffer a substantial hardship if the application were not granted.

e) That the property is a legal building lot under the zoning code and regulations of the Village of Quogue.

f) That the property is and has been a separate building lot since prior to the effective date of Article 25 of the ECL and continuously thereafter.

g) That petitioner owns no other real property that is contiguous to the property in issue; there is, therefore, no other property on which a single-family residence can be located.

h) That the failure to grant a permit to petitioner would, in actuality, result in a taking of petitioner's property without compensation.

Appendix E
[Petition of Joseph F. Gazza, NYSC, County of Suffolk]

i) That prior to purchasing the property, petitioner sought the advice of the DEC as to whether a single-family residence could be located thereon and whether the DEC would issue a tidal wetlands permit under ECL Article 25 and other applicable laws, rules and regulations therefor.

j) That in response to the inquiry referred to in subparagraph "i" above, the DEC prepared a plan for the property (including the location of a single-family residence) and advised petitioner that a single-family residence and associated structures could be constructed on the property under the ECL and related regulations.

k) That in reliance on the DEC's advice referred to in subparagraph "j" above, petitioner purchased the property for valuable consideration and began the application process mentioned above.

7. This proceeding is brought pursuant to Article 78 of the Civil Practice Law and Rules and ECL Section 25-0404 for a judgment finding that, as a result of the DEC's decision dated January 16, 1992, the property was effectively taken without compensation. A copy of the decision with attachments is annexed hereto as Exhibit "A".

8. The real property is located wholly within a residential zone of the Village of Quogue, Town of Southampton, County of Suffolk, New York, and can only be improved with a single-family residence. The property

cannot reasonably be used for any other purpose pursuant to the zoning ordinance of the Village of Quogue.

9. The DEC's decision dated January 16, 1992 deprived petitioner from using any portion of his real property for a permitted zoning use. The property has thereby been rendered valueless, causing petitioner to suffer substantial monetary damage.

10. The DEC's decision dated January 16, 1992 has resulted in the taking of petitioner's real property by the DEC without paying compensation therefor, in violation of applicable provisions of the Federal and New York State Constitutions.

11. ECL Section 25-0404 provides that when a court finds that the DEC has acted so as to constitute a taking of real property without paying compensation therefor, and the real property, nevertheless, merits protection under Article 25 of the ECL (tidal wetlands), the court may either set aside the DEC's determination or require the DEC to proceed with a condemnation of the real property involved, at the election of the Commissioner of the DEC.

WHEREFORE, petitioner respectfully requests judgment pursuant to Article 78 of the Civil Practice Law and Rules, as follows:

1. Determining that the action of respondent, New York State Department of Environmental Conservation, resulted in a taking of petitioner's real property without the payment of compensation therefor, and directing, pursuant

Appendix E
[Petition of Joseph F. Gazza, NYSC, County of Suffolk]

to Environmental Conservation Law, Section 25-0404, that respondent commence condemnation proceedings to acquire petitioner's real property or issue the requested permit.

2. For such other and further relief as to the court may seem just and proper.

Dated: February 7, 1992

s/_____
JOSEPH F. GAZZA

ESSEKS, HEFTER & ANGEL
Attorneys for Petitioner
108 East Main Street
P.O. Box 279
Riverhead, NY 11901
(516) 369-1700

Appendix F - New York Environmental Conservation Law § 25-0404

NEW YORK ENVIRONMENTAL CONSERVATION LAW

§25-0404. Judicial review

Any person aggrieved by the issuance, denial, suspension, or revocation of a permit may within thirty days from the date of the commissioner's order seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court for the county in which the tidal wetlands affected are located. In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interest and objectives of this act, it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain.

Appendix G - Order and Opinion of the New York Supreme Court, Suffolk County Dismissing Petition in *Matter of Frederick Brotherton, Petitioner, against Department of Conservation of the State of New York, Respondent*, Dated February 24, 1997 [Pages 86a - 93a]

Short Form Order*

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART VIII SUFFOLK COUNTY

	INDEX NO.	12809-90
Present:	MOTION DATE:	-------
Hon. LAWRENCE NEWMARK J.S.C.	MOTION NO.:	PETITION DISMISSED SETTLE JUDGMENT

	: PLTF'S/PET'S ATTY:
In the Matter of the Application of	: Smith, Finkelstein, Lundberg,
FREDERICK BROTHERTON,	: Isler & Yakaboski, Esqs.
Petitioner,	: 456 Griffing Avenue
	: Riverhead, NY 11901
- against -	: DEFT'S/RESP'S ATTY:
	: Dennis C. Vacco
DEPARTMENT OF ENVIRONMENTAL	: Attorney General
CONSERVATION OF THE	: by John J. Sipos
STATE OF NEW YORK,	: Asst Atty General
Respondent.	: The Capitol
	: Albany, New York 12224

Upon the following papers numbered 1 to 127 read on this motion: Notice of Motion and supporting papers it is,

Ordered that, upon remand from the Appellate Division, Second Department, and the evidentiary hearing before the undersigned pursuant thereto, the wetlands

regulations considered together with denial of petitioner's application described herein, do not work an unconstitutional taking of the petitioner's property; and it is further

ORDERED that the proceeding is dismissed.

Settle judgment.

The petitioner owns two separate parcels bounded by the Quogue Canal on the north side and the Atlantic Ocean on the south side. The parcels are separated by Dune Road. The deed to each parcel recites a boundary "to the center (of Dune Road)." The parcel abutting the canal is tidal wetlands with a mosquito ditch and wetlands vegetation thereon. The pareel abutting the ocean contains two houses.

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* [This opinion is unreported.]

In 1957 and 1958 the Atlantic Corporation purchased the canal side parcel for $8,500.00 and the ocean side parcel for $15,000.00. Respondent has objected to petitioner's characterizing Atlantic Corp. as wholly owned by the petitioner on the basis of disputes during discovery

resulting in the order of the Hon. Melvyn Tanenbaum striking interrogatories regarding the history of Atlantic Corp.

Deeds, which are in evidence, however indicate that petitioner was the sole shareholder of Atlantic Corp. at the time the corporation was dissolved and the parcels were purchased by petitioner for $200.00 in 1979. Said deeds were recorded on December 31, 1979.

A bulkhead was constructed on the canal side tract in 1968. This bulkhead collapsed in June, 1983. Petitioner applied for a bulkhead permit, but discontinued his application in December, 1983.

On May 25, 1988, petitioner filed another application with the respondent ("DEC") for permission to replace the collapsed bulkhead with a ninety-one (91) foot bulkhead, construct a two hundred (200) foot bulkhead, and dump five hundred (500) cubic yards of fill into the area behind the bulkhead. Petitioner never sought the approval of the U.S. Army Corps of Engineers, as required by the Rivers and Harbors Act of 1899 (33 U.S.C. §401, *et seq.*), and the Clean Water Act (33 U.S.C. §1251 *et seq.*); or of the appropriate local (i.e. County, Town and Village) regulatory authorities.

On September 19, 1988, the DEC granted petitioner a permit to rebulkhead the boat slip, to construct a new bulkhead, but not the two hundred foot bulkhead requested,

and to dump a limited amount of fill behind the bulkhead and boat slip.[1] [2]

Petitioner appealed the determination. Upon hearing the matter, the Administrative Law Judge found that petitioner had not established the need for a bulkhead. The DEC adopted the ALJ's recommendation on May 23, 1990. On June 22, 1990, petitioner brought a proceeding, pursuant to Article 78, challenging the Commissioner's decision on the grounds that it lacked substantial evidence and constituted an unconstitutional "taking" of his property.

The matter was transferred to the Appellate Division; and in 1993 the Second Department determined that the DEC's decision with respect to the bulkhead was supported by substantial evidence, and that petitioner did not establish that the bulkhead was reasonable and necessary. The court then remanded the matter for an evidentiary hearing on whether the DEC's decision constituted an unconstitutional taking, *Brotherton v. DEC*, 189 A.D.2d 814, 592 N.Y.S.2d 437 (2d Dept 1993).

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[1]Petitioner has, apparently, been using the canal side tract as access to the canal for the purpose of traveling to his other east end properties.

[2]Petitioner alleges that the DEC's mandated "Use Letter" stated that a permit would not be issued for the construction of a house on the canal side tract, even though petitioner did not request this relief.

Appendix G
[Order and Opinion of the NYSC, Suffolk County]

At the hearing, a licensed real estate appraiser and broker (Patrick A. Given) testified on behalf of the DEC that the entire property, running from the ocean to the bay, was worth approximately $1,100,000.00 as vacant land. He further testified that the canal side tract (approx. 1.6 acres) was worth $80,000.00 at its highest and best use, for recreational use and water access.

Gary P. Taylor, a licensed real estate appraiser and salesman testified for petitioner that, if the canal side tract were buildable as residential property and bulkheaded, it would have a value of $745,000.00. In its unbulkheaded and non-buildable condition, he valued the tract at $55,000.00. He estimated it would cost $30,000.00 to install a bulkhead and place fill on the property.

Aldo Andreoli, a consultant on environmental health, testified for petitioner that, if bulkheaded and filled, the tract would qualify for a septic tank leaching pool system.

Aerial photographs from 1955, 1974, 1980 and 1993 indicate, among other things, the presence on the property of a mosquito ditch. This led Mr. Andreoli to opine that the property had always been wetlands to a degree, but has now become almost entirely wetlands.[3]

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[3]The Appellate Division's opinion in *Brotherton v. DEC, supra,* indicates that the DEC officially designated 1.5 of the 1.6 acres as tidal wetlands in 1989.

The Tidal Wetlands Act (ECL §25-0101 *et seq.*) was enacted by the New York State legislature to preserve these vital areas. In order to protect the property owner, the legislature also provided for judicial review of DEC action taken pursuant to permit requests, *Gazza v. DEC*, 1997 WL 68590 (N.Y.)

The Court of Appeals in *Gazza, supra*, determined that petitioner could not succeed on his takings claim because, having purchased the property after the enactment of the wetlands legislation, he never owned the absolute right to build on his land without a variance.

This brings the court back to petitioner's argument that he owned the tract in question since 1958. Given the proceedings in discovery and the nature of the testimony at the hearing, there is no competent evidence before the court that petitioner was the sole owner of the property since 1958. The property was owned by a separate corporate entity until its dissolution. The court, therefore, finds that this petitioner has owned the property since 1979.

Petitioner, an experienced builder/developer, took title to property limited by wetlands regulations, and could have had no reasonable investment-backed expectations constituting protected property interests, *Ciampitti v. U.S.*, 22 CL.CT. 310, 320 (1991), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), *Gazza, supra*, *Basile v. Town*

of Southampton, 222 A.D.2d 638, 636 N.Y.S.2d 97 (2d Dept 1995).

Further, the value $745,000.00 placed on the property by petitioner's expert assumes the granting of all permits necessary for the construction of a house. Except for Mr. Andreoli's statements regarding a septic system, such an assumption is without foundation in the record.

A property owner who challenges land regulations as an unconstitutional taking must demonstrate by "dollars and cents" evidence that under no permissible use would the parcel as a whole be capable of producing a reasonable return, *Spears v. Berle*, 48 N.Y.2d 254, 422 N.Y.S.2d 636 (1979), *Smith v. Williams*, 166 A.D.2d 536, 560 N.Y.S.2d 816 (2d Dept 1990), *De St. Aubin v. Flacke*, 68 N.Y.2d 66, 505 N.Y.S.2d 859 (1986).

Furthermore, petitioner must establish every element of his claim beyond a reasonable doubt, a burden of proof which remains his throughout the case and never shifts to the State, *De St. Aubin, supra* @864. Petitioner's proof in this case fails to satisfy this burden.

Even if the canal side tract is considered as a separate parcel, there is ample evidence in the record that the property has recreational value. Petitioner, having historically used the canal side tract for access to the canal and the bay, cannot establish that the DEC decision so restricts his property that he is precluded from using it for any purpose for which it is reasonably adapted, *De St. Aubin, supra* @ 865.

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Finally, DEC makes a persuasive argument that the two parcels should be treated as a whole, given their unity of use and ownership since 1979, *see Penn Central, supra*, and *Ciampitti, supra*. As such, uncontroverted proof indicates that the value of this parcel, as a whole, is $1,100,000.00.

In view of the foregoing, the court finds that the subject denial of petitioner's application did not work an unconstitutional taking of his property interests.

The petition is dismissed.

Dated: February 24, 1997

ENTER:

_____

J.S.C.

Appendix H - Article Published on Page 1 of *Southampton Press* Newspaper, Eastern Edition, Southampton, New York (April 24, 1997) [Pages 94a - 98a]

WETLANDS POLICY TOUGHENED

By Douglas P. Love

In what may signal a new get tough policy, the Southampton Town Board ruled last Friday that the Conservation Board acted properly in February when it denied a property owner's request to build a house within 38 feet of wetlands off Jones Road in East Quogue.

The Town Board action let stand the Conservation Board's conclusion that Annette Lupoli's 2.8-acre parcel was so constrained by wetlands that a single-family house could not be built there. The parcel is bisected by a stream and 72 percent of the lot is covered by tidal and freshwater wetlands, according to the town.

The unprecedented ruling seems likely to have an impact on another controversial case before the Conservation Board in which Sarah Obre of Southampton is seeking permission to build a house within two feet of wetlands off Sagaponack Road in Bridgehampton. Area residents and environmental organizations have been urging the Conservation Board to reject the Obre application citing adverse impacts on wetlands.

Last summer, Ms. Lupoli applied to the Conservation Board for permission to construct a 2,658-square-foot dwelling, swimming pool, deck, bluestone

driveway and "mounded" septic system on her parcel near the intersection of Jones Road and Squires Avenue. In February, the Conservation Board rejected Ms. Lupoli's application citing adverse environmental impacts and forwarded the case to the Town Board with a recommendation that it consider acquisition of the parcel for conservation purposes.

Historically, the Town Board has either accepted the Conservation Board's recommendation and moved to acquire a parcel or sent the matter back to the Conservation Board with orders to approve a wetlands permit. In the Lupoli case, however, the Town Board did something that it had never done before: it concurred with the Conservation Board and found that "the denial of the wetlands permit was appropriate." In effect, it declared the residentially-zoned parcel unusable as a building site.

"I clearly think it represents a change in direction for the town," Town Councilman Patrick (Skip) Heaney said Monday in discussing the Lupoli case.

Only last month, the Town Board sent William O'Connor's controversial application to build a house on a wetlands-constrained lot adjacent to a Sagaponack nature preserve back to the Conservation Board with directions to issue Mr. O'Connor a permit. The Town Board held that it could not justify spending between $500,000 and $1 million to buy and preserve the 5.1-acre lot on Sagaponack Road next to the Nature Conservancy's Sagg Swamp Preserve.

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The Conservation Board held a new hearing on the O'Connor application earlier this month but has not taken any further action.

Mr. Heaney said town officials saw the O'Connor case as only the first in a series of problematic applications to build houses on substandard lots that would be coming into Town Hall. At the same time that the O'Connor case was pending, the state's highest court, the Court of Appeals, handed down four precedent-setting rulings affecting property rights and compensation for government "takings" of land, the councilman explained.

Mr. Heaney said the Court of Appeals rulings made the Town Board "more confident" that it was on firm legal ground in making decisions on wetlands applications than it had been in the past.

"We are relying on the Basile and Gazza decisions," the councilman said, referring to two of the Court of Appeals rulings. That's why we're going to test this."

The Lupoli resolution points out that the Town Board may authorize acquisition of property which has been denied a wetlands permit "where the Town Board determines that the property has been rendered unsuitable for any reasonable income, productive or private use, for which it is adapted, and that its economic value or all but a bare residue of its value has been destroyed as a result of the denial of the permit." The code also allows the Town Board to return the matter to the Conservation Board.

The Town Board resolution concluded that the Lupoli parcel still had some value even though the wetlands permit had been denied.

The resolution states: "In fact, the appraisal submitted by counsel for the applicant demonstrates that the property still holds economic value. Furthermore, based on the determination of the Conservation Board and its findings that the applicant failed to submit information requested by the Board to make its determination, this Board is unable to rule that 'the property has been rendered unsuitable for any reasonable income, productive or private use for which it is adapted.'"

Additionally, the resolution points out that Ms. Lupoli's husband and legal counsel, Matthew Lupoli, had purchased the 2.8-acre lot for $26,000 in March, 1982--four years before the town's current wetlands rules were enacted in 1986. Mr. Lupoli subsequently transferred title to his wife in May, 1993 for no consideration.

"Matthew Lupoli's acquisition predated the town's initial freshwater wetlands law but Annette Lupoli's acquisition did not," the resolution states.

Mr. Lupoli did not return calls earlier this week to his law office in Flushing.

Mr. Heaney said the Town Board treated the Lupoli case differently than it had the O'Connor application for two reasons. The O'Connor parcel was considerably larger than the Lupoli parcel and had sufficient upland area on

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which to site a house, he said. The O'Connor parcel had also been valued considerably higher than the Lupoli parcel, he said.

The councilman said the Lupolis could file a lawsuit in state Supreme Court seeking to have the town's denial of the wetlands permit overturned. But he said that it would be difficult for Annette Lupoli to argue that a "taking" of the property had occurred because she had acquired the property from her husband after the town's wetlands rules had been enacted.

Prior to the action on the Lupoli case and during the controversy over the O'Connor case, the Town Board had proposed amending the procedures of the Conservation Board to give that board exclusive authority over wetlands cases.

Under the proposed amendments to the wetlands rules, which were the subject of a public hearing last Friday evening, the Conservation Board would no longer have to refer cases to the Town Board for further review when denying an application.

At the hearing, attorney and Noyac resident Stacy Kaufman-Riveras said that the board should retain the discretion to review wetlands cases. Mary Jean Green of Hampton Bays, representing the Rampasture Point Association, concurred with Ms. Kaufman-Riveras. She said she wants the board to maintain its ability to consider parcels for acquisition.

Appendix I - Aerial Photo Exhibits in Trial Court

Appendix I
[Aerial Photo]